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ABSTRACT

This paper explores the dimensions of a law, Affirmative Action, and its impact on a university. Section 1 concerns legal aspects with emphasis on historical and legal perspectives of affirmative action; a summary of the guidelines and compliance procedures for administrators; and the legal implications of Affirmative Action as they may affect university administrators. Section 2, organizational aspects, reviews a conceptual framework and history of Health, Education, and Welfare (HEW)/university interaction; institutional response; and some organizational implications of Affirmative Action. (MJM)

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# AFFIRMATIVE ACTION

## Its Legal Mandate and Organizational Implications

University of Michigan

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# AFFIRMATIVE ACTION:

# ITS LEGAL MANDATE AND ORGANIZATIONAL IMPLICATIONS

by

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March, 1974

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# PREFACE

The purpose of this paper is to explore the dimensions of a law and its impact upon a university. To accomplish this we chose a current and controversial legal mandate, affirmative action, identified its characteristics, and analyzed its impact on a university as an organization. At the time this research was conducted, sex discrimination was a focal issue. Our analysis of the impact of affirmative action on a university reflects this highly visible issue.

Personally, we view affirmative action as a needed and beneficial societal and institutional remedy. However, our purpose for this case study was not a qualitative assessment of the affirmative action achievements of a particular university. Rather, it was an analysis of the impact of the law on an institution.

This exploration generated numerous implications. For some of these implications we offer a check list of recommendations or points to ponder for administrators.

The research for this paper was conducted at the University of Michigan, Ann Arbor, in the Fall of 1972. The reader is reminded that adaptation is an evolving process. As a result, additional changes have taken place at the University of Michigan. Our data collection method was to interview various administrators at the departmental, school or college, and central administrative levels. In addition, several individuals closely associated with affirmative action but with no administrative responsibilities were interviewed. Our interviews included common questions exploratory in nature. To this interview information we added our own knowledge about the responses of this and other universities to affirmative action.

We were able to pursue our interests through two courses offered by the Center for the Study of Higher Education at the University of Michigan. The first course--Higher Education and the Law--was offered by Virginia Davis Nordin, J.D. The second--Organization and Administration--was offered by Marvin W. Peterson, PhD. We thank these two individuals for their encouragement, criticisms, and suggestions for the improvement of this manuscript. Finally, we much appreciated the editorial assistance of Bruce Currie, Director of the Center's publications program.

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Doctoral Students, Center for the Study of Higher Education
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# CHAPTER I

## Affirmative Action: Some Historical and Legal Perspectives

Since World War II a persistent theme in the annals of higher education has been the increasingly intimate though uneasy marriage between the universities and the federal government. Analysis of this growing interdependence and its attendant strains presumes awareness of two fundamental questions. Namely, what is and ought to be the university's responsibility to society, and what is and ought to be society's rights vis-à-vis the university?

The burgeoning student enrollments of the sixties, the pressures for open admissions, the racial confrontation on the campuses, and the student protest of the late sixties exploded the myth of the university as a sequestered enclave. Never an impenetrable boundary by any means, the pressing philosophical and moral questions of the decade permeated the university-societal boundary and localized for the most part in the universities. By 1971, the era of confrontation and violence had largely passed. Universities had become more sensitive to shifting societal imperatives and were confronted by the federal government's enforcement of several instruments of revised national policy designed to affect equality of access and opportunity for previously excluded members of the society.

Of these, the most progressive instrument, one which augurs the greatest change for universities, is Executive Order 11246 (amended by Executive Order 11375) mandating that all federal contractors "take affirmative action to ensure that applicants (minorities and women) are employed, and that employees are treated during employment, without regard to race, color, religion, sex or national origin."[1] The Order further stipulates that "such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation..."[2]

For some, the incontrovertible import of enforcing this Order within the university is that all the institution stands for--excellence, merit, autonomy--will be sacrificed; for others, affirmative action promises the excluded their "just due" without endangering these distinctive qualities. For both, affirmative action, when enforced, portends essential revisions in the university and in the society.

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[1] Government Document - 40 Federal Regulation 60.1

[2] Ibid.

Affirmative Action and Non-Discrimination

Affirmative action prohibits universities from taking a laissez-faire stance in the employment of women and minorities. Imagine a continuum. One end represents discrimination, the conscious efforts at exclusion of classes of individuals on the basis of their race, sex, national origin, or religion. The other end represents affirmative action, a corrective effort by the institution to include the previously excluded. In the middle is nondiscrimination, a passive policy which regards traditional mechanisms of hiring and standards of employment as acceptable insofar as they do not intentionally discriminate. Some would argue that discrimination and nondiscrimination are equivalent to the extent that a policy of nondiscrimination may tolerate and perpetuate unintentional biases and does nothing to rectify conditions caused by earlier discriminatory practices or entrenched cultural mores.

The recently promulgated HEW guidelines or Executive Order 11246 (11375) stipulate that nondiscrimination requires that no person be denied employment or related benefits on the grounds of his or her race, color, religion, sex, and national origin, and that affirmative action requires institutions to determine where "under utilization" of qualified minorities and women has occurred. On the basis of these under utilization figures the institutions are to set goals and timetables designed to further their employment opportunities.

To the extent that the educational institutions of the society produce qualified minorities and women, the executive order reiterates previous prohibitions against discrimination and demands that institutions make all reasonable efforts to prevent under utilization of these segments of the workforce. Whether there is an additional obligation under the Higher Education Act of 1972 to produce more qualified academic employees through the application of the affirmative action concept to graduate school admissions is presently under debate.

Those resisting the principle of affirmative action often fail to appreciate the magnitude of unintentional and intentional discrimination or its systemic qualities. They denounce affirmative action's potential for infringing upon an individual's rights in the currently competitive labor market; in so doing they ignore the broader problem affirmative action is meant to correct--systemic discrimination. This perspective contends that the infringement of individual rights must be calculated in both an aggregate and an historic sense. Arguments lodged pro or con affirmative action are often incompatible because of the differing emphasis placed upon the violation of an individual's rights versus individual rights in the aggregate and/or because of the salience of a contemporary or an historic perspective on discrimination. Clarification of the relative weight of these positions is a prerequisite for understanding and refuting opposition to the concept of affirmative action.

Federal Laws Prohibiting Discrimination

Much of the literature on affirmative action attempts to identify the legal levers available to a woman or minority group member seeking institutional redress for discrimination. A university administrator's concerns are somewhat different. Knowledge of what the law says; how it is usually interpreted; what constitutes compliance; how it is enforced, and then how to translate effectively all of the above into workable procedures are or should be uppermost in the mind of an administrator.

Universities are bound by law not to discriminate. At the federal level, laws and regulations which prohibit discrimination in one form or another in the areas of employment, salaries, fringe benefits, admissions, etc., include:

1. Executive Order 11246, as amended by 11375,

2. Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972,

3. Equal Pay Act of 1963, as amended by the Education Amendments of 1972 (Higher Education Act),

4. Title IX of the Education Amendments of 1972 (Higher Education Act),

5. Title VII (Section 799A) and Title VIII (Section 845) of the Public Health Service Act as amended by the Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971.

Many state and local governments have enacted similar statutes.

Of the five federal laws, only Executive Order 11246, based upon the contractual relationship between the federal government and the institution, requires affirmative action programming and planning (goals and timetables) as a matter of course for all contractors holding contracts of $50,000 or more and employing fifty or more individuals. Title VII of the Civil Rights Act of 1964 prohibits discrimination in both public and private educational institutions on the basis of race, color, religion, sex, or national origin in all areas of employment (e.g. hiring, upgrading salaries, fringe benefits, training, and other conditions of employment), but the determination of equitable relief and the need to act affirmatively occurs only in cases where charges have been filed and it is included in the conciliation agreement or ordered by the court. The emphasis in the Civil Rights Act is upon rectifying existing discrimination, not upon the necessity to program affirmative action for the future.

The Equal Pay Act of 1963 prohibits discrimination in salaries and almost all fringe benefits on the basis of sex or race, etc. in all institutions and at all levels. Salary equalization and back pay constitute the appropriate forms of restitution upon a finding of discrimination, but goals and timetables, the mark of an affirmative action plan are not required. Similarly, neither Title IX of the Education Amendments of 1972, nor Titles VII and VIII of the Public Health Service Act of 1971 may be said to require affirmative action. Whether or not the Higher Education Act Amendments of 1972 require an affirmative action student admissions plan is in dispute. Forthcoming regulations under § 902 should clarify the extent of institutional obligation to recruit and admit women and minorities to graduate schools.

Executive Order 11246 stands out among this body of laws because it assumes that to redress inequities, concrete steps in the form of a planning process must be implemented. Where the other regulations concentrate on providing restitution to aggrieved individuals upon a finding of discrimination, Executive Order 11246 (11375) requires federal contractors to take steps now to change their future employment profiles. This is the core of affirmative action's meaning.

## History of the Executive Orders Relating to Manpower

Ten years ago, shortly after President John F. Kennedy had penned the first executive order requiring an affirmative action effort among all federal contractors, then Chancellor Clark Kerr of the University of California remarked in the context of a discussion of what he termed the federal grant university that "the truly major changes in university life had been initiated" not from the inside but "from the outside."[3] While cautioning against the subtle effects of federal influence, he also attempted to allay anxieties about federal control. Were Kerr writing on this topic today, however, it is conceivable that he would consider the imposition of the executive order requirement upon universities as an example of such control, in effect a curtailment of the university's "right as a free agent."

It is especially significant, therefore, to realize that the right of the federal government to impose affirmative action flows from the contractual relationship to which Kerr referred in his chapter, "The Federal Grant University." This relationship had its origins in the reciprocal interest of both the federal government and the university in advancing scientific research and defense needs.

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[3] Clark Kerr, The Uses of the University. Cambridge, Massachusetts: Harvard University Press, 1964, p. 105.

Executive orders are so called because they can be enunciated only by the President and do not require approval by any legislative body. In Contractors Assn. v. Secretary, April 22, 1971, the history of these orders beginning with President Franklin D. Roosevelt's Executive Order 8802, and continuing through President Lyndon B. Johnson's Executive Order 11375 is outlined and the power of the Presidents to enact these orders is upheld.[4] The plaintiffs, an association of more than eighty contractors in a five county Philadelphia area, contended that the requirement which stipulated they must submit an affirmative action commitment with all bids for federal and federally assisted projects was illegal because such orders by the executive branch had not been authorized by the Constitution or any statute. The courts found that when Congress authorizes programs for federal assistance, in the absence of specific statutes to the contrary, the President has a general authority to protect federal interests. In this case the federal interest required the establishment of hiring goals to assure the availability of the largest pool of labor for its projects.

To understand the underpinnings of this decision and the application of Executive Order 11246 (11375) to institutions of higher education which contract with the federal government, let us examine the evolution and gradually widening scope of the executive order program as it relates to affirmative action since 1941.

Executive Order 8802, a precursor of 11246, originated during World War II. It was designed to decrease the cost of labor by increasing the size of the labor pool through the utilization of previously untapped resources (minorities). President Roosevelt based this order (8802) upon his war mobilization powers, and it was directed to the pool of workers available for defense production.[5] It required "that all defense contracting agencies include in all defense contracts a covenant not to discriminate against any worker because of race, creed, color or national origin."[6] A subsequent expansion of that Executive Order 9346[7] required the inclusion of an anti-discrimination clause in all government contracts rather than just defense contracts.

Both Presidents Harry S. Truman and Dwight D. Eisenhower continued to invoke the precedential power expressed in these two orders during their administrations. President Truman, by virtue of his national defense powers and in an effort to assure maximum utilization of available

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[4] Contractors Association v. Secretary. 442 F2d. (3 Cir.) 1971.

[5] Contractors Association v. Secretary.

[6] Government Document - 6 Federal Regulation 3109, 3 C.F.R., 1941.

[7] Government Document - 8 Federal Regulation 1815, 3 C.F.R., 1943.

manpower extended an Executive Order (10216) to other governmental agencies engaged in defense related procurement and created the first committee charged with overseeing compliance with the nondiscrimination clause (Committee on Government Contract Compliance).[8] During the Eisenhower Administration, the Government Contract Committee was charged with the compliance function. For the first time a committee was authorized to receive complaints of violations, to encourage, but not require nondiscrimination outside the field of government contracts (i.e. to encourage educational programs designed to combat discrimination in employment),[9] to require non-discrimination among subcontractors, and to order the posting of nondiscrimination notices by all federal contracting agencies within its jurisdiction (Executive Order 10557).[10]

According to the court, unlike the previous directives, the power to authorize these two orders derived not from the national defense needs, but from an express or implied congressional mandate directing the President to oversee that procurement of government supplies did not exceed in cost or delays those which might have been incurred if minority workmen had been included in the pool. The inability to impose sanctions upon offending agencies by the committee charged with the compliance function severely hampered enforcement of the executive orders. Not until Executive Order 10925[11] were provisions for several sanctions for violations included. In practice, however, conciliation rather than sanction has remained the primary strategy for achieving compliance.

Executive Order 10925 signalled a major philosophical shift in the federal government's expectations for its contractors. The federal contractor was not just prohibited from discriminating, but he was required by order of the procurement authority vested in the Executive to "take affirmative action." This distinction between nondiscrimination and affirmative action has been elaborated upon over time. The inclusion of this stipulation within subsequent executive orders and the extension of coverage to federally assisted construction contracts (Executive Order 11114[12] and 11246) was an attempt by the federal government "to affect the cost and progress of projects in which it had both financial and completion interests."[13] Prior to this time educational institutions as

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[8] Government Document - 16 Federal Regulation 1815, 3 C.F.R., 1951.

[9] Executive Order 10482, 18 Federal Regulation 4944, 1953.

[10] Government Document - 19 Federal Regulation 5655, 3 C.F.R., 1954.

[11] Government Document - 26 Federal Regulation 1977, 3 C.F.R., 1961.

[12] Government Document - 28 Federal Regulation 6485, 3 C.F.R., 1963.

[13] Contractors Association v. Secretary, p. 171.

federal contractors were covered by the nondiscrimination requirements in the Executive Orders 10216 and 10479, but the most significant change in the executive order program for higher education as well as for other contractors occurred with the signing of the Executive Order 11246 (September 24, 1965) amended to include sex by Executive Order 11375 (effective October 13, 1968). This order shifted compliance responsibility to the Department of Labor which formed the Office of Federal Contract Compliance and continued the practice established in Executive Order 10925 requiring contractors to file written affirmative action reports and to submit to investigations consonant with affirmative action requirements.

Judge Gibbon's holding that the "Presidents were not attempting by the Executive Order program merely to impose their notions of desirable social legislation on the states wholesale"[14] sheds light on the Executive Order program. The gradually widening jurisdiction and substance of the executive orders from concern with defense production, to defense-related projects, to subcontractors, and to federally assisted projects and from nondiscrimination to affirmative action was founded at least ostensibly upon a desire to save the federal government money, not as popular notions would have it upon a deep-seated and progressive concern by the Presidents with social welfare.

The rationale for the original order and the expansions of jurisdiction which subsequent orders have empowered has been less a matter of overt concern with societal reform than a matter of economic expediency. Virginia Nordin, a lawyer and the Chairperson of the Commission on Women at the University of Michigan, has made the point, however, that these orders have often been used by the various Presidents for social "legislation" which the Congress desires not to undertake, thus avoiding controversy over progressive legislation.[15]

Application of the cost/completion rationale to institutions of higher education is less than convincing especially under current economic conditions in academia. Academia has a surplus of highly skilled manpower, and there is a trend toward salary equalization through collective bargaining, job scarcity, and salary competition. It is hardly likely that the federal government will realize savings from affirmative action in academia. However, the government (the Executive) does have interests in social justice and equity which find legal support in the courts and justify the social engineering functions of these executive orders.

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[14] Contractors Association v. Secretary, p. 171.

[15] "What Women Want and How They Will Get It," presented at the Big Ten Symposium on Administrative Theory and Practice in Athletics and Physical Education, October 31, 1972, The University of Michigan.

Notwithstanding, the executive orders have thrust upon institutions of higher education new social obligations. The following section notes some of the inequities which have prompted these new responsibilities.

## Need for Affirmative Action

Though this study does not purport to examine the extent of exclusionary and inequitable employment practices, nor their effect upon women or minorities, some perspective is required to understand what Executive Order 11246 seeks to combat. Women do not share equal status with men in academia, and the problem is even more severe for minorities. These problems are quite sizeable as statistical analyses by reputable sources demonstrate. (See for example, Astin, Bayer, 1972; Peterson, 1972).

The recently published Astin-Bayer study sponsored by the Carnegie Commission for the Study of Higher Education and the American Council on Education, sampled 60,000 faculty members from 300 representative colleges and universities. Male faculty were matched with female faculty in terms of degrees held, years of employment, publications, research interests, and fields of specialization. Women in this matched sample were found to be more likely to hold lower academic ranks, to lack tenure, and to earn less.[16]

Dr. Martha Peterson underscored these differences in her keynote address at the 1972 ACE Conference. She said that women, if they get appointed to a college or university faculty, are two-and-a-half times less likely than their male colleagues to become full professors, two-and-a-half times less likely to earn $10,000 or more, and slightly less likely to get tenure.[17]

The recently released National Center for Educational Statistics figures confirm these conclusions. (See Table 1.)

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[16] R. C. Jacobson, "Faculty Women Earning 17% Less Than Men," The Chronicle of Higher Education, Vol. VI, No. 32 (May 15, 1972), p. 1.

[17] Gene I. Maeroff, "The Fight for a Fair Shake on Campus," The New York Times, Vol. CXXVII, No. 41896 (October 8, 1972), p. 1.

Table 1.

Women's Share of Full-Time Faculty Jobs

| | All Ranks | Prof. | Assoc. Prof. | Asst. Prof. | Instructors |
|---|---|---|---|---|---|
| All institutions | 22.3% | 9.8% | 16.3% | 23.8% | 39.9% |
| Public institutions | 22.7% | 10.0% | 15.8% | 23.7% | 39.2% |
| Universities | 17.1% | 6.7% | 12.3% | 20.0% | 44.4% |
| Other 4-Year | 23.2% | 12.7% | 17.4% | 24.7% | 44.0% |
| 2-Year | 32.3% | 21.2% | 24.3% | 31.3% | 35.1% |
| Private institutions | 21.2% | 9.5% | 17.2% | 24.1% | 42.5% |
| Universities | 14.5% | 5.4% | 12.9% | 19.0% | 41.0% |
| Other 4-Year | 23.6% | 12.3% | 19.1% | 25.7% | 41.5% |
| 2-Year | 45.4% | 31.3% | 34.3% | 41.3% | 53.8% |

Source: National Center for Educational Statistics, The Chronicle of Higher Education, Vol. VII., Number 23 (March 12, 1973), p. 6.

For all institutions the current proportion of women is 22.3 percent, ranging in the private sector from a high of 53.8 percent for instructors in two year colleges to a low of 5.4 percent for professors in universities, and in the public sector from a high of 44.4 percent instructors in universities to a low of 6.7 percent for professors in these same institutions. Both as a result of the disproportionate number of women in the lower ranks and as a result of salary differentials within ranks between males and females, college and universities were found to be paying their women faculty members an average of about 17 percent less than their male faculty members.[18] Though these figures mask conditions at individual institutions, the fact remains that inequities exist which correlate with categories such as sex and race.

Aggregate data on minority employees are difficult to obtain, mainly because collection of information by race has been legally prohibited. It is common knowledge, however, that the percentages of minority employees, faculty and otherwise, are miniscule and that these percentages are larger at the bottom of the academic hierarchy than at the top. Breakdowns by level or salary of minority employees are urgently needed, not to confirm discrimination--that is blatantly obvious--but to provide a base line against which the compensatory effects of affirmative action can be measured.

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[18] National Center for Educational Statistics, The Chronicle of Higher Education, Vol. VII, Number 23 (March 12, 1973), p. 1.

How small is the pool of minorities qualified for positions in higher education, especially faculty positions? In 1940 there were only 300 black PhD's in the nation and not one was at a white institution.[19] By 1960 that figure had increased. Two hundred blacks held faculty positions in white colleges throughout the country.[20] The most recent figures available do not distinguish the percentage of blacks holding positions at black institutions from those at white institutions. Thus, 2.2 percent of all faculty members were black in 1969, but that figure covers all universities, all four year colleges, and all two year colleges.[21] Chicanos, Puerto Ricans, and American Indians are employed in even fewer numbers.

Equitable employment practices alone will not ease the position of minorities in higher education. For these groups affirmative action in admissions is a prerequisite to increasing the size of the qualified pool and hence, the percentage hired. Large-scale entry of blacks into white institutions began in 1965. By 1980 a sizable improvement in the size of the qualified black applicant pool should be evident. When that happens, affirmative action for minorities may become a valid concept.

* * * * * * *

Legal strategies are among the most comprehensive tools available to a society for mass social change. What follows is an examination of the legal mandate for affirmative action and its ramifications for one university.

---

19 A. B. Ballard, "Academia's Record of Benign Neglect," Change, Vol. 5, No. 2 (March 1973), p. 27.

20 Ibid.

21 U.S. Bureau of the Census, Statistical Abstracts of the United States 1972, 93rd edition, (Washington, D. C., 1972), p. 131.

# CHAPTER II

## Affirmative Action: The Law and Its Prescriptions
## A Summary of the Guidelines and Compliance Procedures for Administrators

The implementation of affirmative action involves all levels of the institution from the president to departmental chairperson to individual faculty member; therefore, the responsibility for understanding, interpreting and answering the dictates of the executive order rest with the administrator. What are the essential aspects of the law? Where can administrators go for more information? What are the procedures involved in compliance?

This chapter attempts to answer these three questions. It also provides some of the legal background for the companion case study where the response of one university to the law is examined.

The foregoing chapter identified a variety of statutes related to both nondiscrimination and affirmative action.[22] Rather than identify all of the provisions of these laws in detail, we wish to focus exclusively on Executive Order 11245 (amended by Executive Order 11375). This approach has been chosen for several reasons. First, many of the provisions of the other laws, with important exceptions noted below, have been subsumed in various provisions of the executive orders. Secondly, specific guidelines have been prepared which relate the executive orders to institutions of higher education. Thirdly, as government contractors, university obligations focus on the executive orders which were designed to regulate contractor behavior. Lastly, the executive orders address themselves to systemic discrimination, which by definition, requires comprehensive system-wide eradication. For all of the above reasons a detailed description of the law is helpful and necessary.

Before we begin, however, elaboration on systemic discrimination is in order. Systemic discrimination might best be understood as the opposite of the intentional discrimination of one individual against another. It is the often unintended behavior of organizational representatives rooted in attitudes or habits about, for instance, where individuals for certain positions should be sought or what kind of work is suitable for the two sexes. Therefore, assessing systemic discrimination calls for an analysis of organizational patterns which have resulted in unequal access and disproportionate numbers of individuals from a particular ethnic or sex group. Once the extent and cause of inequity have been determined, patterns of behavior can be changed.

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[22] For a handy summary of the characteristics of all these laws compiled by the Association of American Colleges, see "Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions, October, 1972," The Chronicle of Higher Education, Vol. 7, 5 (October 24, 1972), p. 4.

The executive orders are administered by the Department of Labor through the Office of Federal Contract Compliance. This department publishes its regulations in the Federal Register (i.e., Obligations of Contractors: Subcontractors, Revised Order #4, Sex Discrimination Guidelines, etc.). The Secretary of Labor has delegated his administrative responsibilities for overseeing contract compliance with the executive order and for investigating complaints alleging discrimination under the executive order to specific agencies (Department of the Interior, Department of Defense, etc.) of the federal government. The Secretary of Health, Education and Welfare through the Office of Civil Rights, Higher Education Division, monitors and investigates all institutions of higher education who have or seek federal contracts totaling ten thousand dollars or more. Monitoring and investigation are done through regional civil rights offices.

Revised Order #4 lays the basic groundwork for affirmative action programming and planning. It was originally published in the Federal Register, Vol. 36, No. 234, December 4, 1971. The provisions of Revised Order #4 were developed to focus on contractors other than universities. Since many provisions are inappropriate for institutions of postsecondary education, HEW's Office of Civil Rights developed guidelines directly applicable to postsecondary contractors in October, 1972.

The guidelines address themselves to patterns of discrimination. The Office of Civil Rights takes responsibility for complaints involving systemic discrimination and refers individual complaints to the Equal Employment Opportunity Commission (EEOC) created by the Civil Rights Act of 1964. The following is a highlighted summary which flows from the guidelines and often paraphrases and quotes from them. It is a handy synopsis but is not intended as a substitute for a careful look at an easy-to-read document.[23]

The law makes four technical distinctions about which institutions are affected and the nature of their compliance responsibility. These distinctions are: 1) nonpublic institutions, 2) public institutions, 3) affirmative action programming (abiding by the law), and 4) affirmative action planning (creating a written affirmative action program including goals and timetables).

---

[23] All regulations pertaining to the Executive Order 11246 and institutions of higher education are now available from the Public Information Office, Office of Civil Rights, HEW, Washington, D. C. 20201 in the comprehensive manual entitled Higher Education Guidelines, Executive Order 11246.

Which Institutions Are Affected?

All contractors of $10,000 or more must agree to abide by the provisions of the executive order.

> Nonpublic institutions: Nonpublic federal government contractors with fifty or more employees and a contract in excess of $50,000 are required to both act affirmatively (i.e. abide by the law) and to develop and maintain a written affirmative action program within 120 days of the receipt of a contract.
>
> Public institutions: Prior to January 19, 1973, no written affirmative action program was required of public institutions. In the interest of nondiscrimination and affirmative action, it was, however, highly recommended that they conduct the analyses required of nonpublic institutions. After a compliance review by HEW, the institution might be required to develop and maintain a written affirmative action program. Public federal contractors are now required to act affirmatively and to maintain a written affirmative action compliance program.[24]

The foregoing has used the word contractors. Grant recipients are not included under the executive order. What distinguished a grant from a contract? Clarification of this issue appears in a communication from the Office of Federal Contract Compliance. It stated: "A government contract, even if nominally entitled 'grant' but involving a benefit to the Federal Government would be subject to the Executive Order . . . Thus, for example, if the Federal Government contracts with a college or university for the latter to do research for the Government and such contract involves a sum of more than $10,000, it would be subject to Executive Order 11246, as amended." [25] Keep in mind that a contract between any university unit and the federal government in excess of that amount commits the entire university to the affirmative action program.

Areas of Institutional Compliance

The specific areas of institutional compliance and HEW suggestions for abiding by them are described in the guidelines. They are organized under the following areas: recruitment; hiring; anti-nepotism policies; placement, job classification and assignment; training; promotion; termination; conditions of work, rights and benefits which include: salary, back-pay, leave policies; employment policies relating to pregnancy and

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[24] 38 Federal Regulation, 1932, 41. C.F.R., January 19, 1973.

[25] Carol Hermstadt Shulman. Affirmative Action: Women's Rights on Campus, American Association for Higher Education (1972), p. 5.

childbirth, fringe benefits, child care, and grievance procedures. These areas cover most formal aspects of an individual's association with an organization. They relate to the processes of association and, importantly, to the treatment that classes receive in terms of training and promotion.

The following statement summarizes what in our judgment are the most important of these areas. It has recently been stated that,

> The main thrust of the HEW Guidelines is aimed at the recruitment of more women and minority applicants for responsible positions within the field of higher education, although many other topics such as anti-nepotism rules, promotions, back-pay and maternity leave policies are also covered.[26]

Recruitment: Minority and women candidates must be as actively recruited as white male candidates for both academic and non-academic positions. Vigorous and systematic efforts outside of the patterns already used must be made if a university finds that women and minorities are under-represented in its applicant pool compared with reasonable expectations of their availability in the workforce. The activities and policies of each unit responsible for recruiting must be analyzed in this regard. The guidelines suggest a variety of practices that would widen the search network and expand the applicant pool. They include among others: advertising in professional journals, recruiting from black institutions or minority and women's caucuses in professional organizations, and soliciting minority or female applicants from professional registries, or existing university personnel. Nonacademic personnel recruitment can be expanded with more extensive local advertising. It is also suggested that when search committees are used they include women and/or minority representatives.

Hiring: Standards and criteria must be reasonably explicit, should be accessible to all applicants and employees, and may not be used inconsistently to deny employment on the basis of race, sex, color, religion or national origin. Differential treatment in assignment to a particular title or rank is in violation of the executive order. This means that new women should not be assigned instructor status if men begin as assistant professors. Hiring decisions should not be governed by such unverified assumptions as a woman's unwillingness to live in a predominantly white community. If the institution employs its own graduates, equal consideration must be given to all regardless of race or sex. The executive order prohibits preferential hiring which might lead to reverse discrimination and the lowering

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[26] Employment Practices Guide, Section 5098, Commerce Clearing House (October 19, 1972), p. 3183.

of standards. Administrators cannot hide behind a "quota" in explaining the hiring of a minority member to those candidates fully qualified but not selected. Such action violates the guidelines.

Anti-nepotism policies: Policies which have the effect of denying the opportunity for employment, advancement or benefits to an individual because a spouse already holds a position are discriminatory (especially against women) and should be altered or abolished. Policies setting reasonable restrictions on an individual's capacity to function as a judge or advocate for a member of his or her immediate family are permissible when equal opportunity is not denied to one sex over the other.

Placement, Job Classification, and Assignment: The guidelines speak best for themselves on this point. "Where there are no valid or substantial differences in duties or qualifications between different job classifications, and where persons in the classifications are segregated by race, color, religion, sex, or national origin, those separate classifications must be eliminated or merged . . . In addition, appropriate remedies must be afforded those persons previously assigned to such classifications."[27] Two aspects of appropriate remedies come to mind. Back-pay might be used as a remedy for differential earnings resulting from systemic discrimination. Accelerated promotion, assuming competence, might be used in an effort to equalize representation of women and minorities in categories from which they have been either excluded or under-represented.

Termination: This area may be of special importance in a period of declining enrollments and government cutbacks. Here again the guidelines speak well for themselves. "Where action to terminate has a disproportionate effect upon women or minorities and the employer is unable to demonstrate reasons for the decision to terminate unrelated to race, religion, color, national origin or sex, such actions are discriminatory. Seniority is an acceptable standard for termination, with one exception: where an incumbent has been found to have been the victim of discrimination and as a result has less actual seniority than he or she would have had but for such discrimination, either seniority cannot be used as the primary basis for termination, or the incumbent must be presumed to have the seniority which he or she would have had in the absence of discrimination."[28] The implications of this section are substantial and complicated. Either a careful assessment has to be made of the "actual seniority" due a person victimized by systemic discrimination or new criteria have to be found for termination. In some areas of labor law, the courts have indicated that affirmative action requirements take precedence over negotiated contract provisions regarding seniority.

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[27] Higher Education Guidelines, p. 9.

[28] Ibid., p. 10.

Rights and Benefits--Salary: Universities are required to adhere to the concept of equal pay for equal work. The same or equivalent qualifications must be remunerated equally. Salary criteria for job classifications should be made available to present and potential employees. Former salary or external market factors which reflect previous discriminatory practices should not be used in determining the salary of women or minorities.

Back Pay: Back pay is a widely used remedy under several statutes: Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the National Labor Relations Act. These statutes and the appropriate federal enforcement agency will be utilized when the Office of Civil Rights cannot negotiate a voluntary settlement with the university involved. The Office of Civil Rights does not award back pay.

Grievance Procedures: Individual complaints of discrimination by academic as well as nonacademic employees will be referred to the Equal Employment Opportunity Commission for investigation. Patterns of discrimination will be subject to investigation by the Office of Civil Rights. "Where an employer has established sound standards of due process for the hearing of employee grievances, and has undertaken a prompt and good faith effort to identify and provide relief for grievances, a duplicative assumption of jurisdiction by the federal government has not always proven necessary."[29] This provision opens the door for a wide range of institutional initiatives and suggests that the government will honor them. As a minimum, therefore, written grievance procedures should be available to present and prospective employees.

The guidelines discuss the areas of training, promotion, conditions of work, leave policies, employment policies relating to pregnancy and childbirth, fringe benefits, and child care which are not summarized in the above discussion. A careful reading of the guidelines provides both compliance expectations and suggestions for action.

## Affirmative Action Programming

The elements of an affirmative action program are also outlined in the guidelines. The seven items included are summarized as follows:

1. A clear written statement of legal obligation and policy reflecting the institution's affirmative action commitment to equal opportunity and to the elimination of discrimination in employment should be on record.

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[29] Ibid., p. 14.

2. The policy should be disseminated to supervisory personnel internally and to important groups externally.

3. An administrative procedure must be set up to organize and monitor the affirmative action program. An executive should be appointed with top management support to direct the programs. Assistance from both a women's and a minority task force would be valuable.

4. Problem areas by organizational units and job classifications should be identified using data coded and controlled in confidence and limited to people involved in program development and monitoring. Federal laws supersede state or local laws which may prohibit data collection by race, sex, creed, or national origin.

5. Internal auditing and reporting systems should be developed to measure program success and determine if a good faith effort has been made. These systems should include a method of evaluating application retention efforts. As a basis for updating the program an annual report documenting the affirmative action compliance program must be filed.

6. The affirmative action program should be communicated to all employees so that they can avail themselves of its benefits. Plans accepted by the Office of Civil Rights are subject to disclosure under the Freedom of Information Act with certain exemptions.

7. The development of a plan should involve both academic and nonacademic staff in as much of the plan development as possible.

The intent of affirmative action is oriented toward results. However, "the test of compliance for the affirmative action plan is a good faith effort and adherence to procedures likely to produce results."[30] Therefore, goals are distinguished from quotas. Broadly, a goal is a projected level of achievement. Goal achievement is not the only standard of a good faith effort. The complexity of recruitment, hiring, and maintaining standards is acknowledged. The guidelines are not intended to promote the adoption of rigid quotas which would dilute standards and discriminate through the preferential hiring of unqualified individuals.

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30 Employment Practices Guide, Section 5098, Commerce Clearing House, October 19, 1972, p. 3189.

Data Gathering and Analysis

The development of a plan and the establishment of goals is predicated on a detailed analysis of existing personnel composition and practices. The elements of this analysis and the nature of the data required is discussed below. The guidelines detail suggested procedures.

The purpose of the data gathering and analysis is simply to identify patterns of discrimination. These patterns may exist by job classification to the extent that minorities and women are confined to or excluded from particular classifications by rates of pay, status, type of appointment, termination, or rates of advancement.

The creation of a fourteen element basic data file is the first step in this analytical process. These elements include:[31]

1. name and/or identification number
2. sex
3. ethnic identification (Negro, Spanish-surnamed, American Indian, Oriental. All others, including Caucasians, should be identified as "other")
4. year or date of birth, or age
5. current salary (full-time annual equivalent)
6. current job family or generic job family
7. current job title
8. personnel action resulting in current job title (new hire, promotion, transfer, demotion)
9. date of personnel action resulting in current job title (years in current job)
10. previous job title
11. employment status (full-time, part-time, tenured, nontenured, etc.)
12. educational level
13. organizational unit where employed
14. date of hire.

The above data must be organized by department and by job classification across departments to analyze locational discrimination. Mean salary data by sex for each racial and ethnic group must also be available by department and job classification.

The data analysis required includes three primary steps. The first is to determine availability of women and minorities for both academic and nonacademic employment. Availability analysis is a complicated process involving an assessment of both the local and the national humanpower pools. Revised Order #4 offers guidelines for this assessment which are especially valuable in the case of nonacademic personnel drawn from a local pool. The guidelines provide information sources for the development

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[31] Higher Education Guidelines, op. cit., p. J2.

of data bases on the availability of minorities and women for academic positions. National data on earned doctoral degrees provide the basis for utilization studies unless the contractor can justify using another data source. This data may be the case for institutions drawing academic personnel from a small number of feeder schools. In this regard the guidelines state, "If the annual output of women and minorities from the primary feeder schools exceeds the national average, the contractor will be expected to use the higher figures to determine availability. If the output from the feeder schools is less than the national average, the institution will be expected to justify its use of such recruitment sources, or use the higher figures (national average) to determine eligibility." [32]

The second step is to compare the character of the institution with the availability of women and minorities. These comparisons must be made across the institution by comparable job classifications. Where deficiencies exist, goals, either in percentages or in absolute numbers, attainable within a reasonable period of time (the guidelines suggest five years or less) must be established. The third step is a salary analysis to determine whether differences in salaries for employees holding the same job title can be attributed to sex or minority status.

Additional types of analysis are also suggested. A location analysis can provide insights into possible unreasonable containment or exclusion of minorities or women by organizational units such as hospitals, athletic departments, health services, or building and grounds departments, etc. It can provide data on the hierarchical distribution of women and minorities so that impediments to upward mobility can be identified. A promotion analysis comparing the time spent by women and minorities in gaining promotions or the percentages of minorities and women available gaining promotion, to that for white males, might lead to the identification of discrepancies requiring further analysis.

The last area of institutional scrutiny discussed in this section of the guidelines involves testing and test validation. The guidelines require that tests "and all other formal, scored, quantified or standardized techniques of assessing job suitability" be scrutinized to determine if, when used as a selection technique, they have a disproportionate impact on women and minorities.

With this brief summary of the legal sources and requirements in mind, we can now turn to the compliance process itself. The following section is not meant to define the precise standards of compliance which will be determined with more experience, but rather to explicate the processes of institutional review and investigation.

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[32] Ibid., p. J4.

Pre-Award, Compliance, and Complaint Reviews

The federal regulations provide for three types of reviews or investigations: pre-award, compliance, and complaint. Although these enforcement practices and mechanisms are quite explicit and the potential university candidates for scrutiny both numerous and widespread, enforcement has in fact been directed at only a few of the major universities--Michigan, Columbia, and the University of California, Berkeley. The limited resources available to the Office of Civil Rights, the enormity and complexity of investigating a university's employment practices, and until recently nonexistent federal guidelines have hampered and circumscribed efforts at enforcement. Increased enforcement activity may be forthcoming, however. President Nixon's 1974 budget request includes expansion of enforcement agency budgets. HEW's OCR could receive an additional three million dollars if Congress appropriates the funds. This would include sixty positions in the Division of Higher Education. It behooves the university president, or his designee, as the recipient or seeker of a federal contract to be familiar with the obligations and specifications which accompany the acceptance of federal monies and with the Office of Civil Rights Compliance Procedures. A flow chart of these procedures is provided at the end of this chapter as a guide for the college or university administrator.

In examining this chart, keep in mind the following distinctions. A pre-award review is initiated by the Office of Civil Rights where any agency of the federal government identifies an institution of higher education as the prospective recipient of a contract of one million dollars or more, or when modification or extension of an existing contract to this amount is being contemplated. Regular compliance reviews are usually conducted on a periodic basis as part of a systematic program by the Office of Civil Rights to examine the employment practices of the contractors for which it is assigned responsibility. Complaint investigations are undertaken upon receipt of a class complaint or allegation of pattern discrimination. These are usually scheduled on a quarterly basis, although receipt of such complaints may be factors in the determination of which institutions are scheduled for review. In addition to these regular channels for review or investigation, the Director of the Office of Federal Contract Compliance may order the Office of Civil Rights to conduct a special compliance review.

Compliance and complaint review procedures can be divided into several distinct phases. Phase I, the investigation and review component, is conducted by the Regional Office of Civil Rights and differs procedurally depending upon whether the thrust of the investigation is compliance or complaint review. Once a determination of noncompliance and recommendation to the Office of Civil Rights (Washington) has been made by the regional office, its jurisdiction ends. The Director of the Office of Civil Rights oversees directly Phase II, the conciliation and mediation

phase, and in this phase the procedures employed are identical for both complaint and compliance reviews.

Observe that a series of protections have been built into these procedures to insure that the application of sanctions, contract severation or withholding, is a last resort. Since little can be gained by either parties to the contract from the application of penalties the emphasis is upon self-analysis, voluntary compliance, conference conciliation, mediation and persuasion, and only when all else fails, the imposition of sanctions. In Phase III, the emphasis is upon the adjudication of the points of dispute in an informal or formal hearing with an eye to the imposition of contract cancellation, termination, or debarment if satisfactory resolution cannot be achieved. Prior to the levying of these sanctions, the recommendation of the Hearing Officer is reviewed by the Director of the Office of Civil Rights with provision for review by the Secretary of HEW and authorization by the Director of the Office of Federal Contract Compliance.

The division of authority and decision making between the Department of Labor and HEW on the one hand, and within HEW among its regional civil rights offices on the other hand, has fostered enforcement and communication problems to which the administrator should be attuned. Prior to the promulgation of the guidelines, regional offices rendered conflicting interpretations of the executive order to universities. Though the intent of the guidelines is to clarify the Office of Civil Rights' expectations for colleges and universities, until a body of guideline interpretation evolves, or until the guidelines are litigated, inconsistencies in interpretation by region are likely to occur. Review at successive levels of the federal government

Secretary of Labor
Office of Federal Contract Compliance
Secretary of Health, Education and Welfare
Federal Civil Rights Office (HEW)
Regional Civil Rights Office

is a slow complicated process, yet it protects both parties to the dispute.

Nevertheless, it is heartily recommended that university administrators "know well thy enforcement officers." Much of the opposition to affirmative action has been directed at regional offices. Administrators charge investigators with a lack of sophistication about the workings and ideals of higher education. At the university/HEW interface, an adversary relationship has blossomed, fed by the ignorance on both sides as to the scope of the executive order and its procedures. With the publication of the guidelines, movement towards uniformity of information is occurring. Ignorance of the law will again be no excuse.

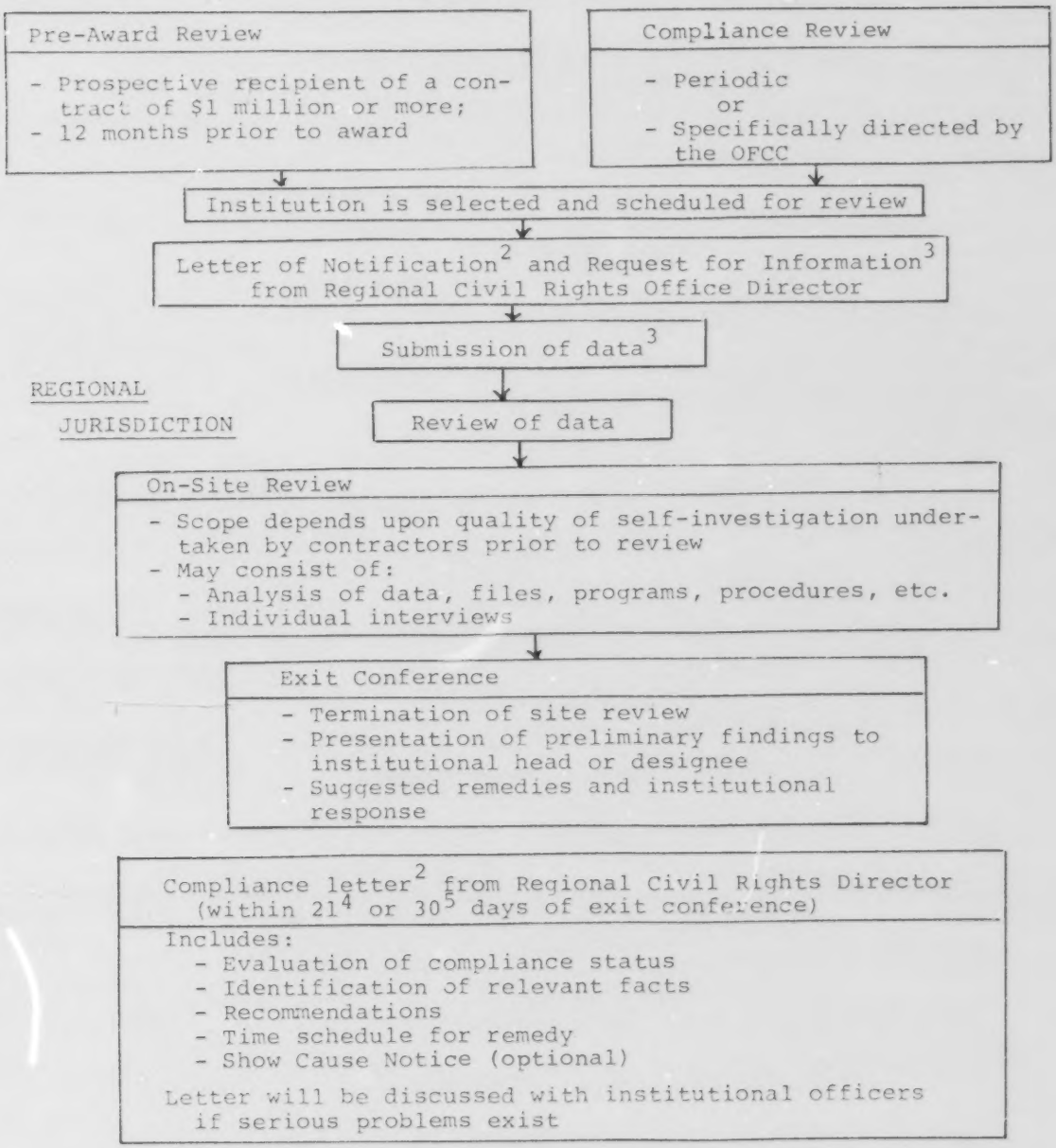
Chart 1

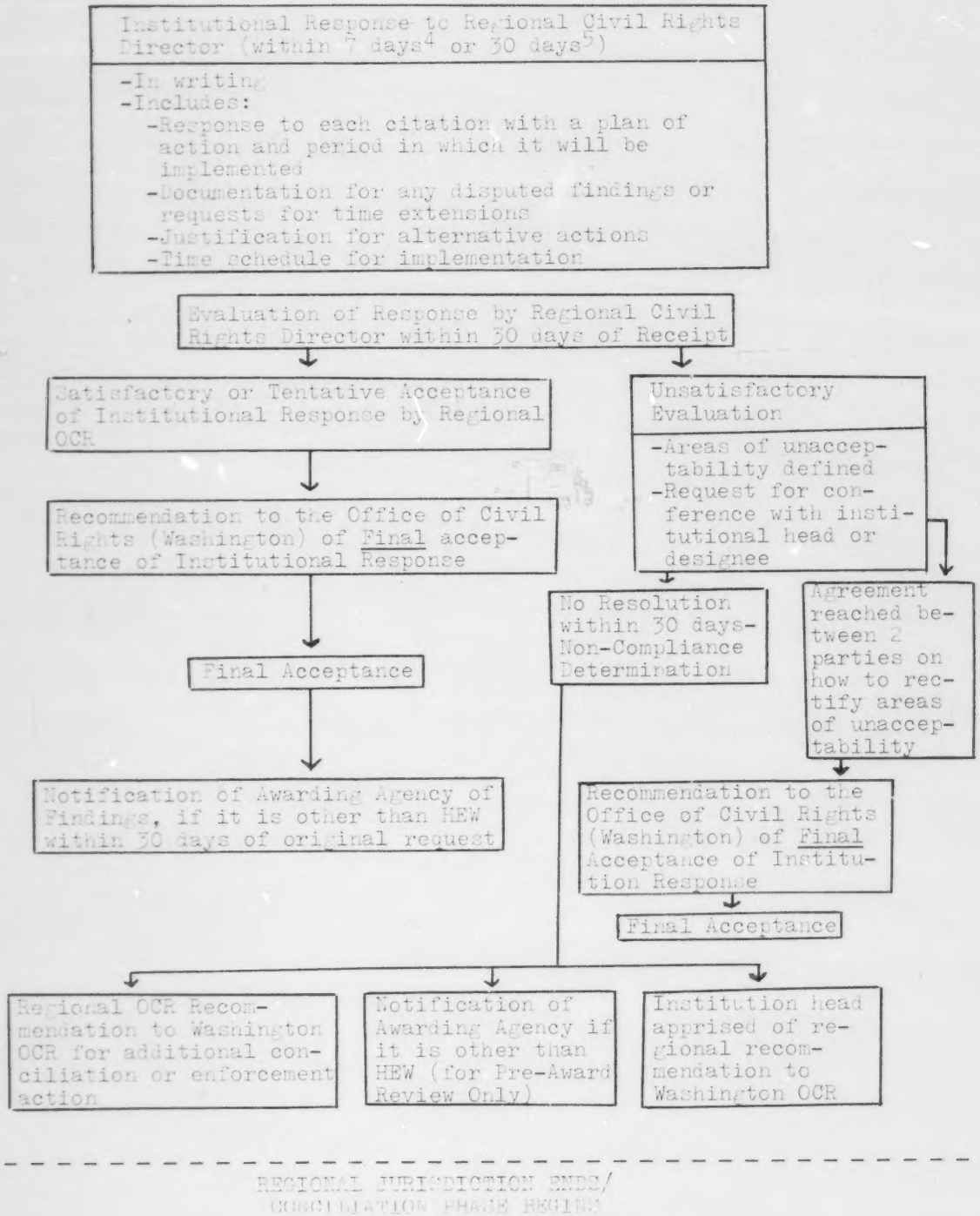
COMPLIANCE REVIEW PROCEDURES[1]

OFFICE OF CIVIL RIGHTS

(HEW)

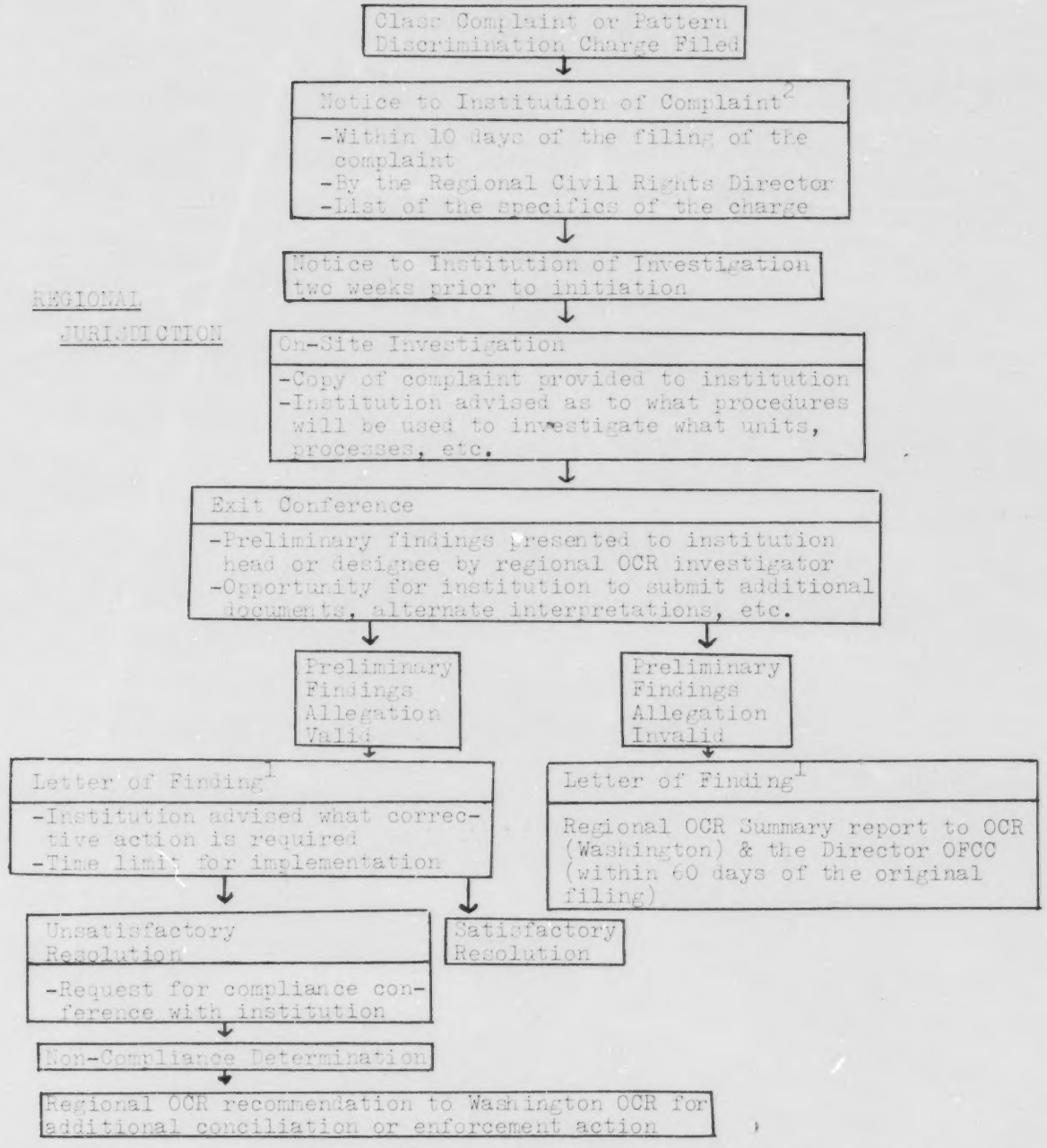
PHASE I: REVIEW


Pre-Award Review
- Prospective recipient of a contract of $1 million or more;
- 12 months prior to award
Compliance Review
- Periodic
or
- Specifically directed by the OFCC
Institution is selected and scheduled for review
Letter of Notification[2] and Request for Information[3] from Regional Civil Rights Office Director
Submission of data[3]
REGIONAL JURISDICTION
Review of data
On-Site Review
- Scope depends upon quality of self-investigation undertaken by contractors prior to review
- May consist of:
- Analysis of data, files, programs, procedures, etc.
- Individual interviews
Exit Conference
- Termination of site review
- Presentation of preliminary findings to institutional head or designee
- Suggested remedies and institutional response
Compliance letter[2] from Regional Civil Rights Director (within 21[4] or 30[5] days of exit conference)
Includes:
- Evaluation of compliance status
- Identification of relevant facts
- Recommendations
- Time schedule for remedy
- Show Cause Notice (optional)
Letter will be discussed with institutional officers if serious problems exist

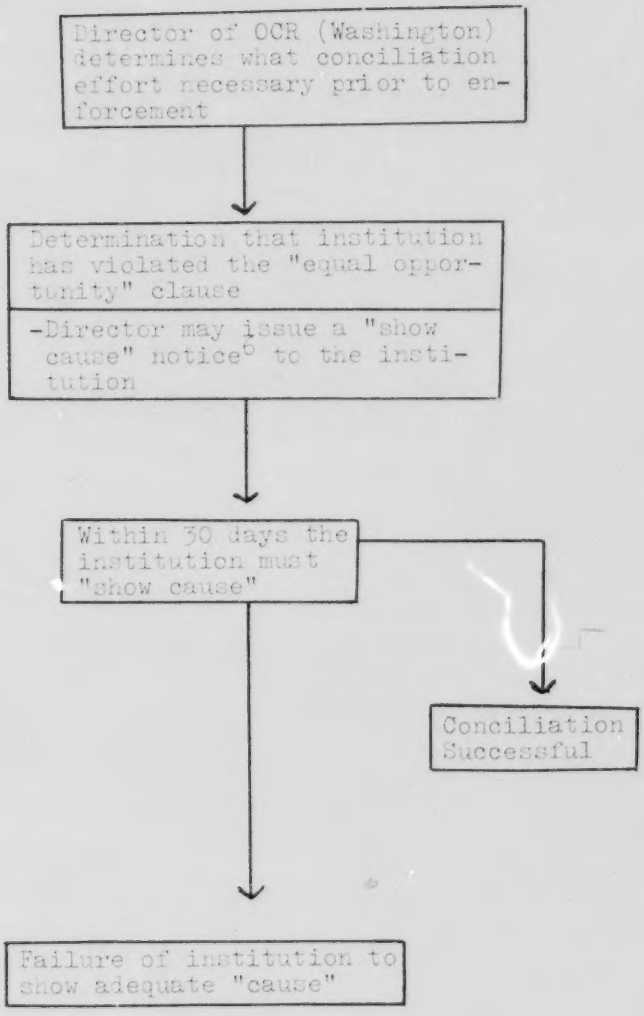

Institutional Response to Regional Civil Rights Director (within 7 days[4] or 30 days[5])
-In writing
-Includes:
-Response to each citation with a plan of action and period in which it will be implemented
-Documentation for any disputed findings or requests for time extensions
-Justification for alternative actions
-Time schedule for implementation
Evaluation of Response by Regional Civil Rights Director within 30 days of Receipt
Satisfactory or Tentative Acceptance of Institutional Response by Regional OCR
Recommendation to the Office of Civil Rights (Washington) of Final acceptance of Institutional Response
Final Acceptance
Notification of Awarding Agency of Findings, if it is other than HEW within 30 days of original request
Unsatisfactory Evaluation
-Areas of unacceptability defined
-Request for conference with institutional head or designee
No Resolution within 30 days-Non-Compliance Determination
Agreement reached between 2 parties on how to rectify areas of unacceptability
Recommendation to the Office of Civil Rights (Washington) of Final Acceptance of Institution Response
Final Acceptance
Regional OCR Recommendation to Washington OCR for additional conciliation or enforcement action
Notification of Awarding Agency if it is other than HEW (for Pre-Award Review Only)
Institution head apprised of regional recommendation to Washington OCR
REGIONAL JURISDICTION ENDS/
CONCILIATION PHASE BEGINS

## COMPLAINT INVESTIGATION PROCEDURES[1]
## OFFICE OF CIVIL RIGHTS
## (HEW)

PHASE I: INVESTIGATION


Class Complaint or Pattern Discrimination Charge Filed
Notice to Institution of Complaint[2]
-Within 10 days of the filing of the complaint
-By the Regional Civil Rights Director
-List of the specifics of the charge
Notice to Institution of Investigation two weeks prior to initiation
REGIONAL JURISDICTION
On-Site Investigation
-Copy of complaint provided to institution
-Institution advised as to what procedures will be used to investigate what units, processes, etc.
Exit Conference
-Preliminary findings presented to institution head or designee by regional OCR investigator
-Opportunity for institution to submit additional documents, alternate interpretations, etc.
Preliminary Findings Allegation Valid
Preliminary Findings Allegation Invalid
Letter of Finding[1]
-Institution advised what corrective action is required
-Time limit for implementation
Letter of Finding[1]
Regional OCR Summary report to OCR (Washington) & the Director OFCC (within 60 days of the original filing)
Unsatisfactory Resolution
-Request for compliance conference with institution
Satisfactory Resolution
Non-Compliance Determination
Regional OCR recommendation to Washington OCR for additional conciliation or enforcement action
REGIONAL JURISDICTION ENDS/
CONCILIATION PHASE BEGINS

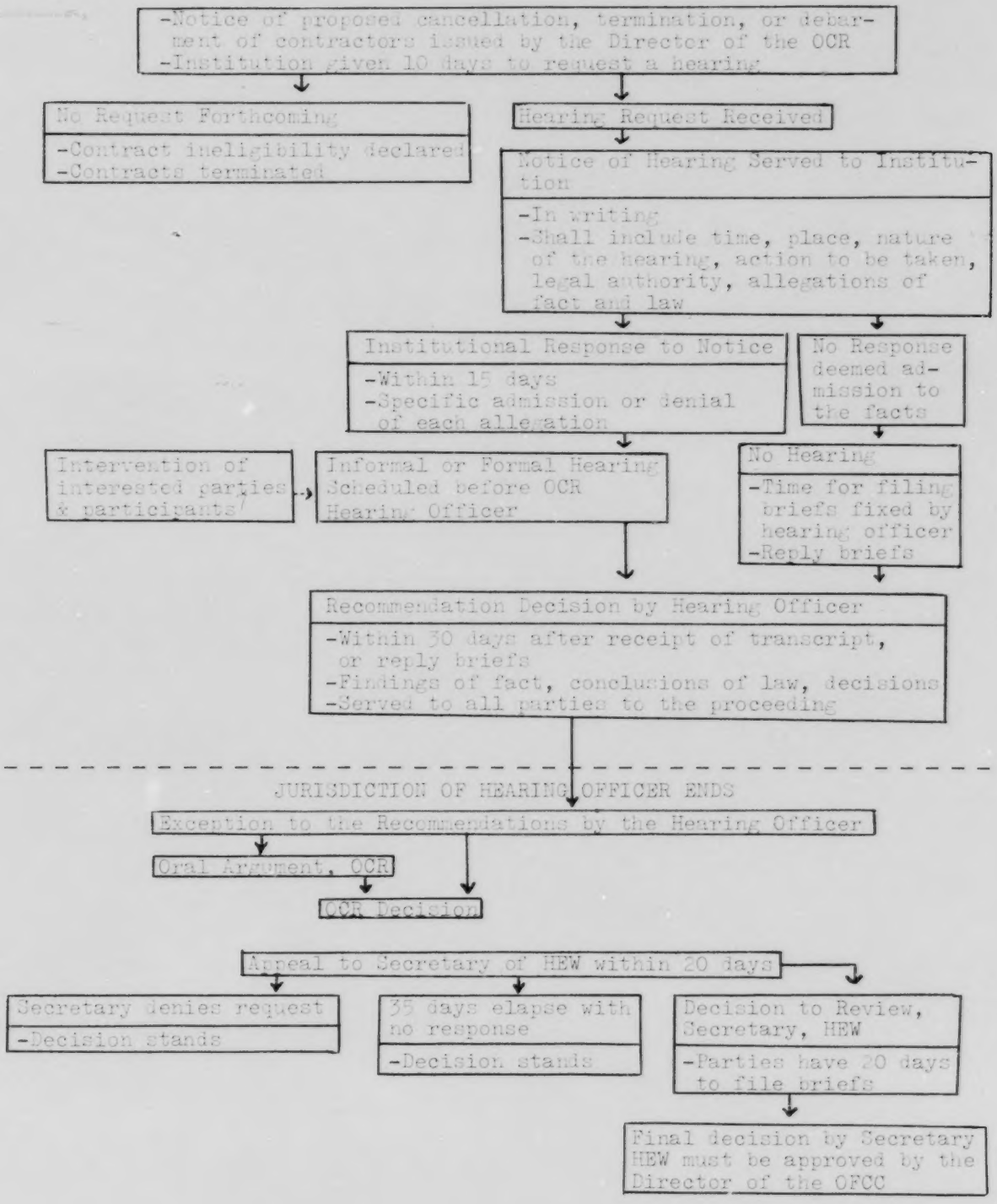
PHASE II: CONCILIATION
(Compliance Review/Complaint Investigation)


Director of OCR (Washington) determines what conciliation effort necessary prior to enforcement
Determination that institution has violated the "equal opportunity" clause
-Director may issue a "show cause" notice to the institution
Within 30 days the institution must "show cause"
Conciliation Successful
Failure of institution to show adequate "cause"

CONCILIATION PHASE ENDS/
ADJUDICATION PHASE BEGINS

PHASE III: ADJUDICATION

(Compliance Review/Complaint Investigation)


-Notice of proposed cancellation, termination, or debarment of contractors issued by the Director of the OCR
-Institution given 10 days to request a hearing
No Request Forthcoming
-Contract ineligibility declared
-Contracts terminated
Hearing Request Received
Notice of Hearing Served to Institution
-In writing
-Shall include time, place, nature of the hearing, action to be taken, legal authority, allegations of fact and law
Institutional Response to Notice
-Within 15 days
-Specific admission or denial of each allegation
No Response deemed admission to the facts
Intervention of interested parties & participants
Informal or Formal Hearing Scheduled before OCR Hearing Officer
No Hearing
-Time for filing briefs fixed by hearing officer
-Reply briefs
Recommendation Decision by Hearing Officer
-Within 30 days after receipt of transcript, or reply briefs
-Findings of fact, conclusions of law, decisions
-Served to all parties to the proceeding
JURISDICTION OF HEARING OFFICER ENDS
Exception to the Recommendations by the Hearing Officer
Oral Argument, OCR
OCR Decision
Appeal to Secretary of HEW within 20 days
Secretary denies request
-Decision stands
35 days elapse with no response
-Decision stands
Decision to Review, Secretary, HEW
-Parties have 20 days to file briefs
Final decision by Secretary HEW must be approved by the Director of the OFCC

FOOTNOTES ON CHART 1

[1]Office of Civil Rights Compliance Procedures, 41 CFR 60, 1-26-2.32, 45 CFR, Part 82.

[2]All notices are to the head of the institution.

[3]The type of information requested and whether it must be submitted in advance varies depending on whether the institution is public or private, whether previous awards or compliance visits have been made, and the amount of the award.

[4]Pre-Award Review

[5]Compliance Review

[6]A "show cause notice" forces the institution to justify why the government should not levy sanctions or enforcement proceedings against it. It is always issued if the following exists

1. No affirmative action program exists
2. The affirmative action program is unacceptable under 41 CFR, 60-2.10-2.32.

A regulation is pending which would allow the Director of the OCR to issue a "show cause notice" when there is a substantial deviation from an affirmative action program.

[7]Parties may include:

A. HEW
B. Person or organization against whom sanctions are proposed
C. Any labor organization which represents persons covered by a collective bargaining agreement
D. Persons or organizations which would be directly affected by the final decision

Participation as a party in the hearing is determined by the hearing officer based upon a petition filed within 15 days of the filing of the notice of hearing. For petition procedures, see 41 CFR 82.5. Participation as "amicus curiae" is permitted if the person or group has a legitimate interest in the outcome. Thus, were negotiations between HEW and a university to reach the hearing phase, the AAUP, ACE, AASCU, or other federal agencies might petition to participate as a party to the proceedings.

# CHAPTER III

## The Legal Implications of Affirmative Action as They May Affect University Administrators

In a sense, Executive Order 11375 is merely one more quotidian input, further uniting higher education and the courts. Historically, the courts have avoided involvement in academic decision making, but colleges and universities have frequently asked the courts to define the authority and autonomy of their institutions. Dartmouth College, one of the earliest and most famous cases, defended its autonomy before the United States Supreme Court in 1819. The College's royal charter was held to be a valid contract, and the attempt by the state of New Hampshire to alter or rescind that contract (in effect making the private corporation a public institution) was decreed unconstitutional.[33]

A landmark case for a public institution involved The University of Michigan. Partly in reaction to a meddling legislature, the University had been granted inviolate constitutional independence in the 1850 Michigan Constitution. In 1895, the issue came to a head when the legislature tried to compel the University to move its homeopathic medical school from Ann Arbor to Detroit, and the question came to the courts for decision. In Sterling v. Regents of the University of Michigan, the University's autonomy and administrative independence were reaffirmed, as "the legislature had no constitutional right to interfere with or dictate the management of the University."[34]

These are only two of hundreds of examples of educational-legal interface. Although the courts have often concerned themselves with questions of the nature of the university and the extent of its powers, they have usually been reluctant to intervene in internal processes, recognizing the unusual mission of academic institutions and relying upon the expertise of the community of scholars for problem resolution.

The question posed by affirmative action is whether the courts will or can continue to exercise a pattern of self-restraint with regard to matters of university governance. Issues such as students' rights, faculty tenure, collective bargaining, tuition, and now affirmative action, are receiving increased attention from the courts which may lead to increased intervention by the courts, and the internal workings of the university. Due to legal complexity and partisan feelings by those involved, educational institutions seem unable or reluctant to solve these problems for themselves.

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[33] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U.S.) 518 (1819).

[34] Ibid., p. 80.

For example, League of Academic Women v. Regents, University of California, Berkeley, is a recent suit brought to court because the women felt that the university was not reacting to their concerns nor moving fast enough to solve its discrimination against them. Specifically, the women sought declaratory and injunctive relief against the university's discrimination toward women in hiring and employment. In an unprecedented decision, the court granted an injunction against further such personnel practices and withheld a final ruling on that segment of the case until HEW had concluded its investigation of the extent of discrimination on campus.[35] This maneuver also forced HEW to vigorously pursue an investigation which had previously been less than thorough. In essence, HEW had to meet a court-defined deadline to fulfill its function. The Berkeley case illustrates two growing trends. First, it is the perception of the individuals involved that an institution like the university moves very slowly with regard to eliminating systemic discrimination and needs the courts to speed up progress. The second trend is the reluctance of individuals and groups to compromise what they perceive as socially just positions, thus forcing the conflict into the courtroom. And it is likely that judicial involvement will increase.

To comprehend how affirmative action (Executive Orders 11246 and 11375) fits into the growing pattern of educational litigation, it is necessary to understand clearly the nature of the executive order and its enforcement power. An executive order is not constitutional, statutory, or common law, and its authority is subordinate to the preceding. In this case, it is an executive ruling which regulates federal government contractors. Thus, the executive order and HEW interpretations have the authority of a law but apply only to those universities which have federal contracts (a fairly inclusive group).

However, the Supreme Court of the State of Washington has recently reiterated the common law principle upon which Executive Orders 11246 and 11375 are founded. Although outside of contract law, DeFunis v. Odegaard involved a white student who challenged the right of the University of Washington's Law School to grant minority students preferential treatment in admissions when he was rejected with a higher law test score. Among other principles, the Court stressed that:

> . . . If the law school is forbidden from taking affirmative action, by increasing minority representation in their Law School this under-representation may be perpetuated indefinitely. No less restrictive means would serve the governmental interest here; we believe the minority admissions policy . . . to be the only feasible plan that promises realistically to work, and promises realistically to work now![36]

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[35] League of Academic Women v. Regents, University of California, Berkeley, 343 F Supp 636 (1972).

[36] "Special Rule for Admitting Minorities," The Chronicle of Higher Education. (March 26, 1973) p. 8.

The important point here is that affirmative action with respect to university administration is acquiring its own body of interpretation. Just as publication of the HEW Guidelines for Higher Education has helped to clarify the administrative implications of affirmative action, cases such as Berkeley and DeFunis are enunciating some of the legal implications for university administrators.

Affirmative action, as a legal mandate, is probably one of most pervasive intrusions of external law upon the university community to date. The legal issues raised by affirmative action are some of the most crucial questions faced by American society, as well as by the university. Two important constitutional doctrines, equal protection and due process, are destined to appear in future legal cases as a by-product of affirmative action. It is not that equal protection or due process are mandated by affirmative action, but that these issues will be used by those who either favor or disclaim the executive order to win a hearing before the court. This chapter will explore these dilemmas from the standpoint of the administrator, although the university attorney should naturally be consulted.

## Equal Protection

The equal protection clause of the Fourteenth Amendment has constantly been used to guarantee student rights, as well as to dismantle racial segregation. Recently, the feminist movement has further tested the powers of that clause. Basically, the Supreme Court has interpreted the Fourteenth Amendment to mean:

> No instrumentality of the State, and no person, officer or agent exerting the power of the State shall deny equal protection to any person within the jurisdiction of the State. The clause (equal protection) prohibits "discriminating and partial" legislation . . . in favor of particular persons as against others in like condition.[37]

Affirmative action has been ordered as a method to overcome the institutional effects of past discrimination, as well as to insure current, positive systemic treatment. The question is raises is: Will previously protected groups (white males) now receive unequal treatment in order for compensation and affirmative treatment to be accorded to previously discriminated groups (women and minorities) or does affirmative action violate the equal protection clause? In simplistic terms, is affirmative action a device that, intentionally or not, will result in reverse discrimination against white males?

Legally, affirmative action may violate the Fourteenth Amendment in two ways: in theory and by application (an invalid application or misuse

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[37] Solomon and Alexander, op. cit., p. 438.

of a valid doctrine). First, does affirmative action as properly defined violate equal protection? No! A subsequent section of this chapter will elaborate on the cases which support this assertion. Second, can over-zealous use of affirmative action concepts lead to a violation of rights? Absolutely yes! However, this is probably a misuse of affirmative action principles. The guidelines are most specific about the legal utilization of quotas and the clear-cut employment decisions in which the obviously more qualified person should be selected.

If an institution actively recruits and hires a minority member or woman for a position, is it guilty of denying a white male his equal protection? Possibly yes, but probably no. Assuming that all candidates meet minimum specifications and that their preliminary treatment is equal, individual rights are not necessarily compromised. In the first place, universities have often utilized preferential criteria in making decisions. For example, categories like the handicapped or veterans have been used to the advantage of one individual over another. Affirmative action merely codifies and publicizes what the criteria may and may not be.

The courts have affirmed that in limited instances an individual may be preferred on the basis of sex.[38] On the other hand, an administrative directive to recruit only women or minorities is likely to be considered suspect. Affirmative action seeks to open the system up, but not to the exclusion of anyone.

The Supreme Court has, however, recognized the compelling public interest in overcoming discriminatory practices and has held that courts have the duty to eliminate the present effects of past discrimination (380, U.S. 14S 1968).[39] In other words, such preference is not illegal if it acts to overcome past discriminatory treatment.

It is further asserted that such preferences may have a legally recognized basis. McLauglin v. Florida (379 U.S. 184 1964)[40] decreed that "racial differences may be recognized and classifications permitted if there clearly appears in the relevant material some overriding statutory purpose."[41] In other words, remedy of past discrimination with the goal of

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[38] McLauglin v. Florida 379 U.S. 184, 192-193 (1964).

[39] "Recent Cases - Constitutional Law - Civil Rights," 25 Vanderbilt Law Review at 235.

[40] R. M. O'Neil. "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," Yale Law Journal, Vol. 80, No. 4 (March, 1971), p. 707.

[41] Ibid.

ultimately providing equal opportunity may be considered a compelling and overriding state interest. A "balancing" test is used, weighing the state's objectives (increasing minority employment) against the infringement of basic individual rights (members of the majority class).[42] If women or minorities are preferred in a situation, the purpose should be to meet a greater social objective. Some loss of an individual's rights may be tolerated if the result is betterment for the many. While such a decision may be debated, it is not invidious discrimination and is frequently endorsed by the courts.

In sum, equal protection is a flexible principle. Faced with the present social situation, the judiciary will probably hold that different treatment of different groups does not violate the principle, in and of itself. What the courts will probably consider most carefully is how well a comprehensive, intelligent balancing test has been applied to landmark cases, rather than whether a particular individual has suffered an infringement of rights. DeFunis v. Odegaard supports this assertion. In conclusion, the court stated:

> . . . that [the] defendants have shown the necessity of the racial classification herein to the accomplishment of an overriding state interest [to correct racial imbalance in the Law School], and have thus sustained the heavy burden imposed upon them under the equal protection provision of the 14th Amendment.[43]

Time spent to carefully establish criteria for a balancing test will ultimately allow maximum justice for all.

The goals versus quotas argument has raged since the inception of affirmative action. Although we can only hope to clarify this topic, let us begin with the official statement from the Higher Education Guidelines:

> Goals are projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force. . . It should be emphasized that while goals are required, quotas are neither required not permitted by the Executive Order.[44]

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[42] Vanderbilt Law Review, op. cit., p. 237.

[43] The Chronicle, op. cit., March 26, 1973.

[44] HEW Guidelines, op. cit., p. 3.

Further,

> In the area of academic appointments, a non-discriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferential treatment" which leads to the selection of unqualified persons over qualified ones. Indeed, to take such action on grounds of race, ethnicity, sex, or religion constitutes discrimination in violation of the Executive Order.[45]

Quotas, or rigid performance standards, imply that a person would be hired solely because of race or sex, not because of ability. This procedure is illegal, for quotas are neither required or permitted by the executive order. Goals, on the other hand, are projections aimed at reducing deficiencies in the number of women and minorities employed, trained, upgraded, or promoted within an institution. As Sidney Pottinger, former Director of HEW's Office of Civil Rights stated: "Goals are projected levels of hiring that say what an employer can do if he really tries . . ."[46] Above all, goals are to be believable, controllable, and achievable, and not used to justify reverse discrimination. While overzealous and/or irresponsible administrators may turn a goal into a quota, one should recognize the difference. A well-analyzed and calmly formulated goal and timetable schedule predicts fair and successful attainment.

There seem to be two rationales for a goal and timetable clause. First, to insure that the institution is really trying to end discrimination.[47] Second, to protect the institution from an irrational quota system.[48] The establishment of achievable goals is an effective means of preventing the use of a quota system. Further, no court has yet sustained utilization of quotas by federal contractors.[49]

The key question becomes: What constitutes a good faith effort, and what is the legal meaning of these words? Various legal sources, including the guidelines, have suggested standards which include: extensive records of recruitment visits and racial composition of organizations contacted (both employee and student recruitment); advertisements in

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[45] Ibid., p. 10.

[46] Sidney Pottinger, "HEW, Affirmative Action, and the Universities," Commentary, Vol. 53, No. 5 (May 1972), p. 15.

[47] Elmer I. Roller, Wayne State Law Review, Vol. 18, No. 3 (May/June 1972), p. 1083.

[48] "Controversy over the Philadelphia Plan for Minority Employment," Congressional Digest, Vol. 49, No. 3, p. 86.

[49] Vanderbilt Law Review, op. cit., p. 234.

general interest and professional publications; statements asserting the institution's nondiscrimination by race or sex; maintenance of a sexually and racially integrated staff, particularly in the recruitment area; and openness with the various federal offices concerned, such as HEW and state and local civil rights commission.[50] Documentation of all efforts should substantiate the extent to which a good faith effort has been demonstrated. A wise administrator must have a clear concept of what constitutes his/her good faith effort in hiring, promoting, and recruiting women and minorities, as well as maintain detailed records of all efforts to achieve that objective.

Due Process

The Fourth Amendment guarantees that no person can be deprived of life, liberty, or property without due process of law. As affirmative action increases the awareness of those discriminated against, the number of due process cases will increase as means of seeking redress. Those who have been the victims of discrimination will argue that the university grievance procedures do not provide an adequate opportunity for the redress of the discrimination they have suffered. Traditionally, few universities have provided such procedures. While courts may be hesitant to prescribe administrative remedies in such situations or to interfere in internal academic procedures, they tend to be very firm in ordering and re-ordering universities to establish or to make accessible specific, comprehensive procedural protections to handle discrimination complaints.

Chief Justice Warren Burger made this point for the U.S. Supreme Court in Healy v. James, a case concerning due process for students. He stated:

> It is within that [college administrative] structure and within the academic community that problems such as these [university governance] should be recolved. The Courts, state or Federal, should be the last resort.[51]

In other words, the courts will maintain a hands-off policy in any issue which could be solved within another administrative structure. The executive officers of a university cannot, under this reasoning, resort to the courts as an alternative to making complicated decisions. Constant recourse to the courts could result in unwelcome judicial intervention in the university's administrative procedures.

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50 "The University's Role in Promoting Minority Group Employment," University of Pennsylvania Law Review, Vol. 119, No. 1 (November, 1970), p. 150.

51 Healy v. James, The United States Law Week, 40LW 5079, June 27, 1972, 4895.

In this context, several points are clear. First, arbitrary and thoughtless decisions with regard to discrimination will not be tolerated by the courts. For example, several department heads made before-the-fact judgments that sex discrimination did not exist in their units and elected to ignore such complaints. Aside from poor administration, such a chairperson is also guilty of nonprovision of due process. While the courts might grant relief to an aggrieved person in such a situation, it is quite likely that the problem will be returned to the university and/or department, with the stipulation that better hearing procedures be implemented within a definite time period. Under this format universities will be forced to institute internal judicial processes that will be monitored externally. A better alternative would have universities establish grievance processes of their own. Not only would this system help overcome systemic discrimination, but it would also preserve the university's autonomy by showing that the academic community can handle its dilemmas.

Equal protection and due process meet for evaluation in the area of hiring standards. Discrimination has been evident in some past employment standards and job tests. It is crucial to note that "nondiscrimination" has developed into a sophisticated concept. Specifically, the recent U.S. Supreme Court case, Griggs v. Duke Power Co. (401 US 422), challenged the relationships among hiring standards, tests, and job requirements. In a unanimous decision, the court found that an employer's use of ability tests and educational standards not related to job performance operated to screen minority groups in hiring and promotion and was discriminatorily unlawful under Title VII of the Civil Rights Act of 1964. In other words, what appears neutral, may be an injurious instrument.

That decision will have an important impact on both academic and nonacademic hiring. One labor lawyer interviewed believed that the case posed one of the most critical questions for hiring in a university setting. Namely, what should academic hiring standards be? Expanding upon this notion, should the requirement for a predominantly teaching job be a research PhD? Should it be a requisite for job promotion? These questions ask for difficult job definitions. What amount of time is spent in teaching, research, or community service? Can academic or executive qualifications be legally defined? Is there an upper limit to such qualifications, and if not, should minimum or maximum qualifications be the standard? Many would contend that the PhD is an inappropriate preparation for teaching and probably accelerates content acquisition by the professor beyond the needs of undergraduates. One of the concepts developed in Griggs was the notion that if an individual without "paper" certification successfully performs in a job, then the standard is invalid. By that criterion, many uncredentialed individuals would make adequate, if not excellent, teachers in some of the humanities and social sciences.

The notion of testing is also related to academic hiring. If college entrance is viewed as a critical step in an individual's preparation for a job, the validity of entrance tests becomes important. Screening instruments such as the GRE or SAT exams become subject to challenge in the courts. The mechanisms used to assess the quality and preparation of academic personnel would appear to be vulnerable to judicial scrutiny and re-evaluation under Griggs. Adjudication may be hastened as much by the unemployed doctorate (who realizes that his/her credential does not open up a limited job market) as by those who allege sexual and racial discrimination.

The focal point of affirmative action at this juncture is hiring and employment practices, and it will probably remain so for some time. The dilemma of the administrator is that she/he may assume that the institution's decision making context is fair in form, only to be told by the courts that it is not fair in its outcomes. This is precisely why "good faith" requires institutional commitment and administrative leadership to fulfill the spirit and the letter of the law.

The legal issues affirmative action raises are many. Due process, equal protection, good faith efforts, hiring standards, and job testing are obvious areas of concern. Without question, university administrators must utilize their expertise and their resources in exploring these issues with reference to their individual campuses. The decisions to be made are not just administrative, but involve legal consequences. Nor are the issues resolvable solely in the courts, for the repercussions affect the daily workings of the university too deeply. Affirmative action is both a catalyst and a protagonist in bringing such issues as equal protection and due process into the mainstream of the ongoing and ever-growing interaction between the university and the courts.

# CHAPTER IV

## Institutional Response: A Conceptual Framework and History of an HEW/University Interaction

Thus far the executive order has been rather off-handedly referred to as "an external force impinging upon the university." A host of assumptions about organizations in general and universities in particular form the basis of this description of the executive order as an external force and flow from the application of an open-systems theory to organizations. Though the university has a distinctive organizational form, it shares much in common with all human organizations. At the highest level of abstraction, a human organization is a system involving a continuous flow of energy from the environment through the system itself and back into the environment. In other words a human organization is a dynamic cycle of events or processes in which human labor and resources (inputs) are transformed into finished products (outputs). An ongoing relationship between an organization and its environment occurs because the latter sustains the organization and constantly evaluates its functional utility. Thus, vulnerability to external forces is the given in an open-systems model.

Paralleling the interdependence of the university and its supersystem is the university's internal structure, consisting of highly interdependent but functionally separate subsystems. Each subsystem (department, school, research unit, college, etc.) is defined in terms of its own dynamic cycle of events and its interrelationship with other subsystems (managerial and maintenance) for the purposes of accomplishing the research, teaching, and service functions of the university. This assumption about the university is on one level synnonymous with the image of the university derived from an open systems model: a social organism or structure dynamic and highly interdependent both internally and externally.

A second assumption is that while universities as organizations are characterized by continuous flux, radical changes are the exception rather than the rule. We distinguish between the dynamic recurring processes that contribute to an organization's equilibrium and those that are directed toward major change. Equilibrium militates against major change and for the preservation of the organization's existing character. Therefore, when organizational upheaval does occur, the likelihood is that an external force has intervened.

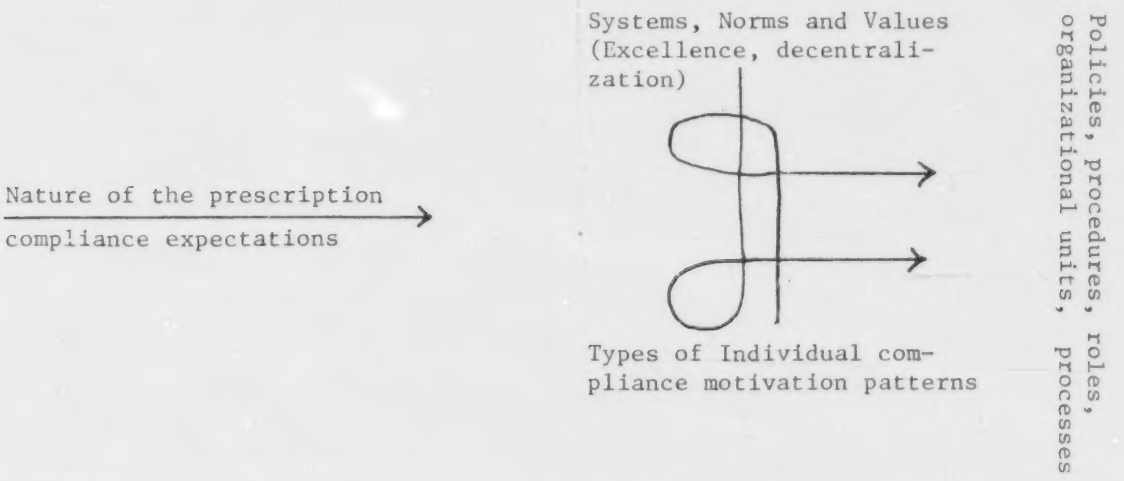
The executive order is a weapon against patterns of employment utilization and compensation which discriminate against women and minorities. Rigorous enforcement of this order where previously there was no enforcement is a vivid example of a shift in a university's external environment.

A change in the supersystem translates into altered input for the system.

For instance, HEW, in accordance with the emphasis upon enforcement, told the university that the required affirmative action compliance and complaint reviews obligated the university to supply detailed information on its recruitment and hiring procedures, a practice of documentation to which the university was not accustomed. Hence, a new output is demanded of the institution. Existing policies, processes, and roles are inadequate to accomplish what is demanded by the new input. To accommodate this shift in the external environment, the institution undertakes structural modification. New policies, new processes, and new roles within the university undergo revision. Combatting systemic discrimination compels systemic modification. In turn, the process of modification creates strains within the institution.

Interview data indicate that various sectors of the academic community have responded and will continue to respond quite differently to the executive order. Norms and values and also motivational patterns provide two conceptual tools for explaining different responses.

The flow and interaction of an external event with the norms, values, motivational patterns, and structures of the university are modeled below.


Systems, Norms and Values (Excellence, decentralization)
Nature of the prescription
compliance expectations
Types of Individual compliance motivation patterns
Policies, procedures, roles, organizational units, processes

The interactions and actual changes resulting from affirmative action are analyzed in detail in the following section.

Norms can be thought of as the behavior expected and sanctioned by the system for particular roles. Values are the philosophical bedrock of these norms. The university under consideration has a distinctive set of norms and values which shape its academic culture and, in turn, its response to pressures for affirmative action. This institution is among the most prestigious of public institutions in the country. It enjoys constitutional autonomy within the state and has vigorously protected that autonomy in the courts over the years since its creation. As in most academic cultures, freedom of expression, dissent, and diversity of opinion are encouraged and valued. Large segments of its population are socially conscious and active in both social problem solving and public policy implementation. Its schools, colleges, research centers, and departments pursue varying missions with varying degrees of autonomy. It is in the best sense of the phrase a decentralized multiversity.

With such a multiplicity of functions and missions, institutional governance requires delicate and skilled hands. In comparison to the industrial sector, decision making is quite decentralized, and leadership roles are more facilitative than autocratic. The institution prides itself on the degree to which autonomous and decentralized decision making characterizes its specialized academic and administrative units, and institutional problem solving is most frequently accomplished through the committee mechanism. Rational investigation by representatives of the community culminating in recommendations is an accepted strategy for governing the institution. Thus, the norms and values of the institution support a decentralized, collaborative structure as the appropriate organizational framework for accomplishing the university's diverse and multi-faceted educational tasks.

This decentralized decision making structure complicates an already difficult task to begin with--the task of assuring acceptable institutional compliance with a legal mandate. The early expectations for the process of achieving compliance were forged in the industrial sector. Unlike the industrial sector, however, academic administration is not synonymous with corporate management. Though legal responsibility for the implementation of affirmative action resides with the central administration, the actual success or failure of affirmative action flows from decisions made in the individual units--creating, in the words of one university participant/observer, "an administrative mire."

The requirement to act affirmatively cuts across the entire organization, touching virtually every level and every subsystem both academic and nonacademic. The question of implementing a change strategy to affect affirmative action in a decentralized university is just a specific example of a more general problem which universities repeatedly encounter--namely, the absence of a mechanism or an appartus to facilitate change and long-range collective planning and action. A prerequisite to affecting a change in the university is a high degree of cooperation and commitment

among the university community. Without quite widespread support, even the most clearly articulated and rational proposals end up being shelved. The norms of the institution argue against change by administrative fiat and do not permit the central administrator the luxury of bypassing or removing those unsympathetic to a particular plan. Administrative manipulation through mutually acceptable tradeoffs is one modus operandi, but at the most fundamental level of authority--hiring and firing--faculty prerogatives have precedence over central administration power.

It has been frequently noted that within the organization of a faculty, power is highly decentralized. The main pattern of academic organization is "associational" rather than bureaucratic. The university does not stress line authority since basically all full faculty members are formal equals or "colleagues," as the common phrase goes.

While prevailing norms and values provide a means of analyzing the institutional response to the executive order, they do not fully explain the nature of the response. Organizational behavior is motivated behavior, and the sources of impetus for change in the institution are complex. Affirmative action arouses some motivational patterns but not others. Katz and Kahn posit a four dimensional typology to explain organizational behavior.[52] Of these, two dimensions, legal compliance (translated commitment to the law) and internalization of organization goals (translated commitment to the program on its merits), are germane. Interview data indicate that those respondents who support the affirmative action effort do so out of a commitment to upholding laws per se or out of a commitment to the goals of affirmative action and the university's role in actualizing them. These two motivational foci have different outcomes, and on the basis of them we might on the one hand predict and on the other hand explain the differential response to affirmative action within departments, schools, centers, and administrative units.

Commitment to affirmative action in the first instance stems from an acceptance by members of the university community of the legal authority of the executive order program and its sanctions. Dual forces account for this acceptance: 1) the recognition of the power of the enforcers, and 2) the internalized acceptance of legal norms as legitimate authority. Legally based compliance, taken alone, however, neglects the second source of motivation, commitment to the goals of the executive order. In this case, the motivation to comply with the executive order is activated because the goals of the program harmonize with the values and self-concept of individual members. These individuals are dedicated to facilitating equality of access and opportunity within all levels of the institution. In all probability, their dedication did not require the catalytic agent of an executive order.

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[52] Daniel Katz and Robert C. Kahn, The Social Psychology of Organizations (New York, 1966), p. 341.

Historical Background of an HEW/University Interaction

There is no doubt that the history of HEW's interaction with the university has had a bearing on the institution's current response to the exigencies of the executive order. Early exchanges between the agency and the university revolved around a complaint review, not a routine compliance review. Implicitly, the investigation of a complaint by an outside agency has onerous connotations for a university's central administration. In effect, it implies that management procedures for handling internal grievances and disputes are inadequate. In a compliance review, no presumption of wrong-doing is made, and the adversary lines are not so clearly drawn. The accent is upon monitoring an institution's efforts to increase its percentage of women and minorities against its own realistic assessment of what it can accomplish. This assessment is based on an analysis of the pool of qualified applicants and is represented by the goals and timetables submitted to HEW by the institution for acceptance. Thus, although the review procedures are essentially the same in both the complaint and compliance reviews, the emphasis differs.

HEW made its first affirmative action moves in August, 1970, because the formal organization of the university, the managerial structure, had failed to respond to a shift in environmental variables. For a year and a half after the signing of Executive Order 11375, few efforts were made by the university to achieve voluntary compliance. Whether by accident, intent, insufficient legal advice, or insufficient communication from the federal government, awareness of the executive order and a sense of urgency about its import were minimal among the upper echelons of the administration.

Nonetheless, the consciousness level of women in academe was on the increase. They were the first to perceive that: 1) an organization-environmental mismatch existed in the employment of women, 2) in the absence of adequate procedural protections in the university to encourage the lodging of complaints of discrimination, a force with the weight of law, Executive Order 11246 (11375) could be applied from without. Women within the university had amassed data on the status of women here. Indeed, their evidence compelled administrators to revise their assumptions about groups recognized as the victims of systemic discrimination. Women now had to be considered along with blacks and other minorities, whose movements had greater legitimacy on campus, as warranting favored consideration by employers, where qualifications were equal with other candidates and affirmative action was mandated.

Performance of the complaint review function by HEW requires a transaction of information in the form of an official complaint about a contracting organization's personnel practices. The statistical information supplied by PROBE, a group composed of females within the institution, to HEW about the university's personnel practices, enabled HEW to: 1) investigate how effectively the university as an organization was complying

with the nondiscrimination/affirmative action requirements, 2) present a letter of finding to the university based upon the analysis of statistical information on the percentages of women and minorities at various levels in the institution, and 3) request that the university file a written Affirmative Action Program directed at bringing the institution into line with societal goals.

The university delayed in accordance with Revised Order #4 which exempted all public institutions from filing a written Affirmative Action Plan.[53] Though HEW/university negotiations continued, this act resulted in HEW's withholding university contract funds--a second instance of a failure by the organization to anticipate the environmental consequences of its acts. Against this background a most significant event occurred when President Robben Fleming and HEW negotiated a compromise in which university units would produce three-year staffing projections and a structural accommodation would be made in the form of the appointment of a Commission on Women.

With the threat of further investigation and contract termination by HEW hanging over the university, subunits (departments and schools) perceived the central administration as having no recourse. A heightened sensitivity to equal rights demands growing out of the BAM (Black Action Movement) strike in the spring of 1970 and the flourishing women's movement also contributed to organizational receptiveness.

The appointment of a women's commission charged with the review of the affirmative action plan and administration requests for goals and timetables from subunits shifted the primary locus of pressure for compliance from the environment to the organization itself. There was an immediate increase in information flow to the university community in general on: 1) women's rights, 2) the tentative affirmative action plan of the university (excluding goals and timetables), and 3) the existing status of women in the university by percentage, status, and remuneration. As a consequence, institutional awareness of the executive order intensified.

As one of the first institutions confronted with wholesale compliance to the executive order, the university could not model its behavior upon the prior responses of like universities or even on the explicit expectations of HEW. The responses which followed were, therefore, piecemeal coping devices, rather than the product of long-range planning and phased implementation. In the absence of a mechanism to facilitate change, organization behavior can best be characterized as "ad hoc." The notion of goals and timetables in the executive order would indicate that an Affirmative Action Plan might have much in common with, for example, one of the Soviet Union's Five Year Plans. In practice, however, the university's Affirmative Action Plan is less a model of where the institution is headed than an approximation of where it is now.

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[53] Revised Order #4 (See 41 C.F.R. 60-1.5 (A)(4)).

Comprehending where the institution is in its accommodation to the executive order is no simple task. In part that is because of the high degree of specialization within a university. No two subunits are identical. Also, while the institution as a whole may have bound itself to operationalizing the concept of affirmative action, the legitimacy and urgency of that commitment are perceived and hence implemented differently at various levels and within various offices. In envisioning the flow of the analysis in Chapter 4, this diagram may be of assistance.

CHART II



| Catalytic Event | Institutional Accommodation | Institutional Strains | Summary |
|---|---|---|---|
| HEW Enforcement of Executive Order 11246 (11375) | I. Policies<br>A. Personnel<br>B. Information<br>C. Grievance<br>D. Resource Allocation<br><br>II. Administrative Roles<br>A. Old Roles Transformed<br>1. President<br>2. Intermediate Executive Roles (Vice Pres. & Deans)<br>3. Other Leadership Roles<br>B. New Leadership Roles<br>1. Affirmative Action Officer<br>2. Women's Commission<br><br>III. Institutional Processes<br>A. Information and Communication<br>B. Hiring Decisions | Autonomy<br>Legal Expectations<br>Prestige<br>Moral Dilemmas<br>Goal Attainment | Legal Compliance at the University<br><br>Internalization of Organizational Goals<br><br>Institutional Control over Affirmative Action Management |

# CHAPTER V

## Institutional Response: Elements of Accommodation

Open-Systems theory, attribution of norms and values to an institution, and the notion of motivational bases for organizational behavior taken together provide a framework for comprehending the variety of the responses which a university might make to an external event. The foregoing chapter attempted to elaborate upon these concepts and to document the impact of affirmative action on the university in the early stages of enforcement. The university's response may be divided into a number of analytical categories--the reformation of substantive policy, changes in policies involving implementation procedures and processes related to them, the creation or organizational units and roles, and the redefinition of other roles. Though conceptually distinct, these categories of organizational response are interrelated. In the following treatment, heavy emphasis will be placed upon identifying and dissecting these interrelationships in institutional response. In addition, the byproducts of institutional response, internal organizational strain, will be related to the norms and values discussed earlier.

### Affirmative Action Policy Formulation

Policies can be divided into those which relate to the substantive goals of the institution and those which concern the procedure to implement goals. The major changes in university substantive policy occurred when the institution announced its intent to increase the number of minorities and women in its academic and nonacademic ranks and to eliminate systemic practices which were discriminatory. This policy was enunciated in June, 1969, and up-dated in 1971 and 1972. Implementational policy was slow to develop for several reasons. The first was the lack of specificity in HEW expectations, including what constituted a good-faith effort. The second involved the set of decentralized decision making norms prevalent in the university and discussed earlier.

Officially, the substantive policies "reaffirm and expand the University's continuing commitment to: 1) the principles of equal employment; 2) increased effectiveness by setting forth the action being taken and to be taken by the University and its employees concerning employment opportunities; and 3) provision of measures of implementation, self-enforcement, and achievement."[54] The major responsibility for implementing this policy was divided among the vice presidents, the assistant to the Vice President for Academic Affairs, and the personnel director

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[54] University of Michigan, "Equal Employment Opportunity Affirmative Action Program," issued on June 4, 1969; revised: July 24, 1969 and March 2, 1971, 1972.

of the University. The specific responsibilities of these individuals are articulated as part of the Affirmative Action Program. Currently, goals and timetables, numerous data charts, and monitoring mechanisms are expected from each dean, director, or head of an operating unit. Although procedural in content, the formal enunciation of these expectations was, in fact, a substantive policy, given the norms of the university.

## Personnel Policies and the Personnel Office

Historically, separate personnel systems existed for faculty, for professional and administrative staff (this system was further divided into academic and nonacademic professional and administrative staff), and for all other university personnel. Decision making for faculty and academic personnel was highly decentralized, with responsibility for hiring devolving upon faculty committees, department chairpersons, or unit heads. The recruitment of faculty members was informal and directed toward high caliber graduate students from comparable universities. The referral processes for these same graduate students was equally informal. Review of departmental hiring decisions at higher organizational levels was *pro forma*. In contrast, personnel procedures in the nonacademic realm were more centralized. The responsibilities for budget control and for the recruitment and referral of applicants was delegated to a main personnel office.

One of the first procedural policies directed department chairpersons to establish goals for the employment of women and minorities. These goals were both adaptive and maladaptive. They were adaptive in that they began to focus attention on the problem and its solution and to stimulate movement in the intended direction. Further, establishing goals met one of the external requirements of HEW. However, in some cases unrealistic expectations were generated because the goals were often "guesstimates" rather than realistic projections of what was possible given the available pool and the rather intense talent competition among universities.

Pressures for a uniform organizational response created the need for the centralization of a number of personnel functions and the elaboration of existing personnel mechanisms. Of the five units within the personnel sector of the University, two are significant for understanding the impact of affirmative action. A new personnel unit in the planning stages prior to the advent of affirmative action was created. This unit, the Office of Professional, Administrative, and Staff Services (OPASS) consolidated previously separate personnel practices for professional and administrative staff on the one hand and instructional staff on the other. It assumed responsibility for the coordination of open posting and external advertising of professional, administrative, and faculty openings. In this way

some personnel duties previously scattered throughout the University were centralized, coordinated, and regularized.

A second personnel unit, Compensation Plans and Information, was assigned the tasks of carrying out the file review and salary equalization procedures, of implementing the Hayes Study findings and of pulling together all the data for reporting to HEW. This unit doubled in size in an effort to accommodate these new responsibilities.

The Hayes Study deserves special mention. Hayes and Associates reviewed all the positions encompassed by OPASS for the purposes of bringing them into a single salary structure and obliterating the academic/nonacademic distinction which characterized this component of the system. The practical effect of the implementation of this report was that some 2,000 academic jobs which in theory should have been funneled through and regulated by OPASS finally were so channeled.

In general, the new centralized, open system of recruitment and selection for faculty has been heralded as an enormous improvement over the white, male buddy-system which in the past characterized faculty recruiting. However, several serious complaints have arisen. As could be expected, the frustration with time consuming redtape is very real. And, it is the academicians (dean and department chairpersons) who have suffered both loss of power to hire directly and the increase in paperwork required to hire anyone. As an example, 250 applications were received for a single position in one department. An additional resentment is the increase in power of the central administrators, in this case OPASS and Compensation Plans and Information. Many academicians have the vague feeling that because of the centralization in both systems business values are taking over the university, that its norms are becoming corporate rather than reflective of the needs of an educational endeavor. In other words, these offices have been delegated power, but their legitimacy is still in question.

## New Information Demands and Personnel Policies

A centralized hiring scheme inevitably required an extensive record-keeping system. (An important distinction between standardized hiring procedures and centralized decision making will be made later.) In part, this system was necessary in order to document the "good faith effort." But, more importantly, it had to do with a higher level of organizational accountability. Previously, individual departments and units maintained their own files. Once university executive officers assumed responsibility for any discrimination that might be incurred, they demanded that qualitative data be easily accessable. HEW sought new kinds of information from the university which the university had never demanded from its own employees, thus necessitating new policies and processes. Decision

making reviews on hiring and the recruitment process became more substantive and less pro forma.

Here, then, is an example of the interaction of a social policy (equality) with an organizational policy (more documentation), which results in a new technical policy (computerized information reporting). Because of the volume of information required, the cycle also worked the other way. The computer's need for consistent coding required a new organizational policy enforcing the acquisition of this information, which, in turn, created a new social relationship between the information sender and receiver. The chairperson's amount of communication on hiring has expanded and become more routinized as a result of affirmative action. A different information link with the central personnel office is being established. The nature of this communication is highly formalized in contrast to past, informal collegial contacts.

HEW has stressed that universities should institute internal grievance procedures rather than react to complaints initiated in the federal system. The grievance process for nonacademic employees entailed a hearing before a neutral party and possible reviews at consecutively higher administrative levels. In sex discrimination cases this process was challenged with the women's commission advocating a more legalistic approach including the right of cross examination for example. Consequently new university-wide grievance procedures were developed. The women's commission currently watchdogs the appeals process and will continue to do so until a permanent procedure is established.

Similarly, no uniform grievance procedures are available to faculty members. Each organizational subunit has its own procedure for handling charges of discrimination or unfair employment practices. Only when decisions made within schools or colleges are appealed to the Senate Advisory Review Committee do uniform procedures take effect.

Grievance procedures are especially important as one avenue through which an institution manages conflict. The quality of these procedures bears directly on organizational effectiveness and employee morale. By channeling conflict internally according to indigenous norms, the likelihood of resolution is enhanced and external intervention (with its duplicative effort) is avoided.

## Resource Allocation

Resource allocation is another area of substantive policy affected by affirmative action. Implementation of affirmative action is expensive. Newly incurred costs include: an Affirmative Action Office, a more elaborate personnel-data system, expanded recruitment procedures, additional staff services and redefined secretarial support roles. Because

of slowly expanding financial resources for university programs, affirmative action expenditures often force difficult resource-allocation decisions. Implementation of affirmative action requires a reconsideration of priorities and a major financial commitment for its support. Interview data indicate that financial priorities are changing in response to affirmative action.

## Administrative Roles Transformed

Another level of analysis examines the roles of those who form the university community. Almost everyone has been affected by the affirmative action policies, at least at a level of awareness. However, several positions will be analyzed more intensively -- president, Affirmative Action Officer, department chairperson, and the women's commission-- which merit more intensive study. In each case, the role has been newly created or significantly redefined.

## Presidential Leadership

President Fleming occupies a pivotal position as he is accountable to HEW for the policies and practices of the university. In a sense, he sits on the boundary line between the internal and external worlds, responsible to each. Because of this dual orientation, Fleming would like to develop a collaborative relationship with HEW representatives. However, to date the relationship may be better characterized as noncollaborative and co-reactive, not unlike a chess game.

The president exerts both internal and external leadership. Of course, his responsibilities have always included coordinating the policies and functions of the university. In one sense, affirmative action has not changed the president's role within the university. In another, a new role expectation for moral leadership has been instituted by the intervention of HEW, as the result of complaints by campus women. President Fleming has been the symbolic focus of agitation for organizational change and women have evaluated his role in terms of his behavior. For example, his public stand against university provision of day care facilities has disappointed those who viewed favorable action on this issue as symbolizing institutional commitment to the equalization of opportunity for women. This disappointment persists even though these individuals may discount the monetary and physical difficulties in implementing the program.

President Fleming's relationship with the external world has also changed. He now operates within additional specific legal constraints. The federal government sits as his monitor. He has new areas of accountability to consider. Although one would not call his leadership style "daring," he does fulfill the definition used by Katz and Kahn: "A leader is one who influences a matter of organizational relevance."[55]

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[55] Katz and Kahn, op. cit., p. 302.

What is most interesting is Fleming's skill-mix and dual-leadership orientation within the university. He functions as an originator--changing, creating, and implementing structures to conform to affirmative action necessities. Through his or the regents' authority, the women's commission, the Commission on Minority Affairs, and OPASS were established; recruitment and placement were expanded; and differential pay scales and ill-defined job grades eliminated. On the other hand, Fleming maintains a pivotal role and intermediate level of leadership in relation to HEW. In this sense, his function is to supplement and interpolate structure. Particularly in the early stages of affirmative action (April, 1970, to January, 1971), this two-way orientation prevailed. In part, the nonspecific, rather disorganized style of HEW administrators created a piecemeal, one-act/check-back cycle between the agency and the university. Although a more well-defined dialogue has since evolved, the president must still look outward and inward as he makes his policy decisions.

In terms of activating the legal compliance pattern of motivation, President Fleming has at least four options: 1) He may use appropriate symbols of authority (directives, etc.); 2) He can clarify legal norms (explain the executive order to the community); 3) He may use sanctions and penalties to gain compliance (withhold funds until a school or department makes a "good faith effort"); and 4) He can threaten to expel nonconformists.[56] The first three seem most appropriate to higher education, but as yet are only partially utilized in this instance. Directives from the president have been minimal, coming instead from the vice presidents, especially the Vice President for Academic Affairs. This policy is consistent with the decentralized decision making structure of the university, although it raises the question of the symbolic aspects of the presidential role. This is not to assert that affirmative action directives are issued without Fleming's knowledge. But, as a leader, the president does not seem to use his position as the focal point of the attack against systemic discrimination.

As a leader, President Fleming could utilize his position to better clarify the legal mandates of affirmative action. People are still confused about the force of Executive Order 11375, for one new department chairman thought that affirmative action was a slogan with no legal force. Better publicity and discussion of the legal expectations might prevent such misunderstandings. Use of specific incentives and/or penalties are often necessary to indicate commitment to goals, yet no such mechanisms exist here. Extra funds as rewards for creative compliance, community recognition, withholding of funds, or nonconfirmation of appointments are possible incentives and penalties to compel compliance. In any case, a president has a number of methods to use in order to achieve affirmative action compliance throughout the institution. Positive sanctions are certainly preferable, but all means should be considered as necessary corollaries to the policy-making function. Unless policies change behavior,

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[56] Ibid., p. 348.

they lack credibility and produce dissatisfaction due to heightened expectations of the presidential role.

## Intermediate Executive Roles

Within the university the various vice presidents and deans serve as the interpolative leaders. Pivoting between the Executive Council and the department chairmen, the vice presidents and deans greatly influence the ways and means of implementing affirmative action objectives. They typify the symbiosis that exists between their faculties' point of view and the administration's stance. In some cases the two are mutually exclusive. The deans, particularly, have been responsible for many facets of the compliance effort. Student-recruitment programs, faculty-search committees, salary review and parity, and internal communication about affirmative action are examples of their efforts. While the ultimate test is whether the lower levels of administration incorporate these ideas, the deans can certainly predetermine much of the response of their subordinates. The fragile issue of how long to let the interpolative leader have free rein and when to insist on goal-oriented achievement remains open.

Another type of leadership exists within the university. It involves those who administer the on-going system. In terms of affirmative action, two categories of administrators exist: the academic or department chairpersons, and the nonacademic division or unit heads. Heads of departments possess "technical" knowledge and awareness of faculty norms, both necessary for immediate implementation of affirmative action. They have the responsibility to recommend faculty candidates, to advertise new positions, to recruit potential students, and to distribute fellowships to them. At this level affirmative action becomes either a reality or a failure. While it is conceivable that a department head could merely pay lip service to the new procedures, it is clear that the executive officers (President Fleming and Vice President Smith) would consider such behavior unacceptable. This perception was reinforced recently when the Regents held deans of schools which were lagging in minority-student recruitment accountable for their units' "good faith efforts."

## Other Leadership Roles

The personnel director, purchasing agent, or director of admissions, provide a different type of leadership. They, too, possess the "technical" knowledge necessary for implementation of affirmative action in their departments. Within personnel alone, formation of the Office of Professional and Administrative Staff Services, the computer-based Personnel Information System, the file review procedure, and minority apprentice programs illustrate effects of the Affirmative Action Program. University hiring of minorities and a conscious effort to negotiate contracts with minority businesses are other aspects of options in the nonacademic realm.

Not only must these administrators make judicious use of their personnel and resources, they must also see that equity is properly dispensed, that rules are followed, and that the average worker understands the relationship between his/her task and institutional policy. For example, a secretary must learn to complete a host of new forms as well as to document much of a department's good faith effort. The volume of such work is burdensome by previous standards, not to mention the added sophistication required. Further, a subcontractor must be made aware of the obligation to develop affirmative action plans. Should these links be weak, or become overloaded, the new system could easily become dysfunctional.

New Leadership Roles

Aside from the redefinition of existing roles, two new major roles have evolved. The appointment of the Affirmative Action Officer to the president's staff and the women's commission are two events which demand closer scrutiny. With regard to the former, Dr. Nellie Varner, an assistant professor of political science, black, woman, became the first Affirmative Action Officer at the University of Michigan.

Finally, her appointment symbolizes the entry of a woman and minority into the executive ranks of the university. The specific job functions include:

(1) Maintain liaison with government officials concerned with affirmative action programs.

(2) Further define and refine the University of Michigan's Affirmative Action Program so that it will comply with all laws and regulations applicable in this area.

(3) Systematize review of the program and see that proper steps are taken to assure compliance, and to document the results.

(4) Maintain liaison with minority and women's commissions so that they will be familiar with and aware of all facets of the program.

(5) Make periodic reports to the university as to the progress of the program.

While the formal role expectations of the Affirmative Action Officer are obvious, public expectations were not completely incorporated. Some women and minorities expected the officer to possess great administrative powers which would quickly move women and minorities into the university structure. Further, they hoped the officer would be able to advance a wide range of programs relevant to the needs of these groups. From this viewpoint, the Affirmative Action Officer is best conceived as an administrative catalyst rather than an advocate or line officer.

Specifically, the Affirmative Action Officer has focused on review of university personnel procedures--recruiting, hiring, and promotion--and their effects on women and minorities at the University of Michigan. Certainly, this is a sizeable task and much needed anchor for the Affirmative Action Program. This tact facilitates the legitimacy of the office, as it is both helpful and uncontroversial. In addition, the decision to give top priority to personnel review was a logical way of defining the nature and scope of this previously nonexistent post. Without a role model to follow, Dr. Varner consolidated her efforts in one major project as she unravelled the complexities of her office.

The role of the Affirmative Action Officer typifies the norms and values of this university. The assistant to the Vice President for Academic Affairs and the personnel director are responsible to Dr. Varner for the implementation of affirmative action policies. In addition, the Affirmative Action Officer has regularly scheduled meetings with the deans to insure their understanding of their affirmative action obligations. Implementation of all policies rests with these people. However, the Affirmative Action Officer has no autonomous power. The officer lacks any veto power over faculty appointments should affirmative action procedures not be followed. Rather, veto powers are an executive perogative and probably, an unused tool. The rationale behind this decision was to remove the Affirmative Action Officer from the cross-fire of such a task, assuming that the executive officers could better absorb such hostility. Of course, hostility may never become an issue should the veto not be exercised. The Affirmative Action Officer does not threaten the executive officers as she holds no direct authority over them, nor over the department chairmen or unit heads who actually do the hiring. In sum, the norm is one of informing and nudging the executive officers while implementing their policies and working with, not over, the academic units.

The role definition of this office enhances its legitimacy within the administrative structure, although it may jeopardize future credibility with local women's and minority groups. The role of the Affirmative Action Officer is potentially conflict-ridden as a result of differential role expectations. While the Affirmative Action Officer's role may not induce rapid reform, it should promote progress and maintain a modicum of stability. In the long run, this may be the catalyst for more extensive change.

The Commission for Women has been in existence for two years, and has assumed an open advocacy role. It is charged with review of the Affirmative Action Program in all areas, study of policies and procedures which may contribute to discrimination, and expansion of the social awareness and sensitivity to discrimination within the university community. Currently, it is operating with fewer organizational duties and more

social policy functions. The commission acts as a linking pin, resolving conflict in a quasi-administrative way. It hears grievances about discrimination and tries to transpose complaints and injustices into university policy. For example, salary inequities resulted in the initiation of a file review procedure by the women's commission. Lack of faculty awareness of feminist issues led to pressure for a women's studies program. Consequently, potential conflict is resolved by women, for women, without the administration having to be directly involved. While the women's commission seems to absorb the most ardent feminists, it also works to activate the neutrals. It has succeeded to a considerable degree in sensitizing the university community.

Institutional Processes: Information and Communication

Much of the information relevant to affirmative action was generated by and maintained within subunits. The informational requirements of affirmative action had the impact of standardizing the type of information collected and shifting its storage location from subunit offices to a centralized data bank. The refinement of this standardization and collection process continues as the informational requirements of affirmative action are being integrated into a broader, computer-based, management-information system. Long-range plans include the development of a new Personnel Information System (PIS).

The scope of the information being collected has been expanded because of the law's requirements. Items pertinent to affirmative action have been included on a variety of forms. In some cases these have challenged norms about previously banned categories such as racial identity. Under recent amendations of federal law, this information can now be gathered for use in differentiating minority and women applicants from others being considered.

Expanded recruitment practices have augmented the number of applications departments receive for posted positions. This increase in applications has generally lengthened the search process and added to a department's administrative load. Not only must the collection and review of applications from minorities and women be documented, but interview data must also be retained.

All of the foregoing suggest that affirmative action requirements have enhanced the importance of information and its analysis in hiring decisions. But with this importance has also come increased costs.

Organization change assumes some degree of aroused interest and focused attention on the necessity for and direction of change. In a complex organizational setting the arousal and focusing take place through a variety of intended and unintended means.

Various communication processes available to the institution have been used to inform institutional members about the philosophy and requirements of affirmative action and the procedures necessary to comply with the law. Media have also been used to inform the public about the university's response to affirmative action.

Enhanced institutional awareness has come from communication both internal and external to the university. Internally, memos from top management have been disseminated; time has been spent in monthly meetings discussing affirmative action; and a weekly university publication has been used to create awareness as have been the reports of study commissions and the activity of a variety of groups. The student newspaper has also published articles related to affirmative action. Institutional awareness has also been enhanced by sources external to the institution. Interview data indicate that a major source of information transmission has occurred in professional meetings and via professional publications. These two sources were consistently cited by both academic and nonacademic administrators for their coverage of issues pertaining to affirmative action.

In addition, the university has attempted to inform the public about its affirmative actions. This public awareness process is one element the guidelines suggest for an effective affirmative action program. Television, radio, and ad hoc documents have been used as information sources. A variety of nontraditional media such as predominately black publications have been used to advertise position openings. The open posting of positions has also enhanced awareness. Reports to HEW regarding the university's programs have informed this particular agency. One annual report has been filed, and subsequent annual reports are expected.

## Faculty Hiring Decision Processes

Criteria applicable to hiring decisions in the past have ostensibly been excellence in teaching, research, or a combination of both. But departmental variation in the application of a standard of excellence has been the pattern. "The best" appears not to have been an absolute but an interpretable notion. To their credit, some departments have felt it important to provide faculty models for minority and women students and thus applied additional considerations to a hiring decision.

The existing norm for faculty hiring places the decision at the departmental level. Review of these decisions by deans, vice presidents, president, and Regents has been pro forma. The law mandates that recruitment practices which have been collegial and therefore systemically discriminatory must be expanded so that women and minorities are actively sought. In practice this has meant enlarging the informal network and advertising in appropriate media to expand both the frame of reference and the candidate pool available to decision makers.

Hiring decision review no longer can be considered a routine exercise. Under the Affirmative Action Program the recruitment effort and decision making process for the primary applicant receive careful scrutiny to insure that a good faith effort to hire minorities and women has been made. There has not been any explicit shift in the locus of hiring decisions. The assumption is that the department chairperson (usually as spokesperson for the committee charged with hiring) or the dean is still in the best position to make that judgment. However, a review to spot deficiencies in the good-faith effort is deemed necessary and prudent in view of the institution's accountability to an outside monitoring agency. Therefore, the decentralized decision making norm has been retained.

There are basically two trends visible in the operation of affirmative action at the institutional level. The first is standardization. The nature of information collected and the documentation required for a good-faith effort have been standardized. Also, temporary standardization has taken place regarding grievance procedures. In this sense, departments and colleges will become more alike in their personnel practices in an effort to promote equity within the institution. Those interviewed were generally sympathetic to this trend. The second tendency, perceived and feared, is the centralization of hiring decision making. To date, hiring decisions are not being made by the central administration although one dean did remand a hiring decision to a departmental chairperson for reconsideration. The centralized storage of information for efficient, rapid institutional analysis through computerization does not seem to be an issue nor does it appear to have altered university norms.

## Institutional Strains

Pressures and subsequent institutional responses lead to strains. The impact of affirmative action has produced strains on institutional norms, values, processes, and resources and on individuals who are in decision making roles. These strains can be grouped in the following categories: autonomy, legal expectations, prestige, moral delimmas and goal attainment.

The involvement of the federal government through prescriptions about institutional behavior challenges values associated with autonomy at a philosophical level. Practically, many react negatively to the concept of setting goals which will become, in the estimation of some, quotas. Federal specification of recruitment practices erodes the discretionary latitude which previously belonged exclusively to college faculties. The new practices have also created hiring delays and massive informational requirements further limiting institutional flexibility.

Issues of collegiate and departmental autonomy have arisen repeatedly. There was the question which arose over the review process for hiring decisions. Was review by the Affirmative Action Officer for informational purposes or for the containment of a veto prerogative? Also, there was anxiety that the centralization of information sources might result in business values holding precedence over academic ones.

Some strains are caused because, until recently, criteria for an acceptable affirmative action program had not been well defined. The issue of what constitutes a good-faith effort is still not clear. This lack of clarity is to be expected in an area where little administrative or legal experience provides precedents.

Some administrators and faculty fear that institutional prestige will be eroded. In their perceptions the necessity for hiring minorities and women will force the institution to abandon high academic standards, especially in the short run when candidate pools are limited. There is the issue of whether to hire a minority group member acceptably qualified when a white male, for example, appears to be maximally qualified.

Other administrators and faculty fear the loss of institutional prestige unless the university produces an affirmative action response of excellence. For these individuals the university should serve as an example of an institution forging positive change. The possibility of a loss of funds because of insufficient progress on affirmative action would be an embarrassment.

Consequently, a variety of ethical dilemmas are producing strains and role-conflicts for decision makers. Does affirmative action implicitly impel the institution to hire an individual with questionable qualifications and does this not then damage the individual and defeat the intent of the program? Some consider affirmative action to encourage preferential hiring in violation of the intent of the equal protection clause of the Constitution. For some, the whole issue of acknowledging ascriptive criteria, when years were spent in efforts to eliminate them, is repugnant.

Goal attainment is another dimension of strain. For those who aspire to a speedy resolution of the problem of systemic discrimination, frustration is likely to occur because of the pace at which the university complies with the law. For others, current norms are comfortable and right. Therefore, strain is produced by the impatience of some and the reluctance of others.

Summary: Overviews of Organizational Response

Several conceptual tools may be useful in summarizing and classifying the multifaceted responses of the university to affirmative action. The first two are tables representing patterns of organizational activity referred to earlier. The first table focuses on patterns related to legal compliance. The second table's focus is on patterns related to the internalization of organizational goals.[57]

The third tool is a model developed by Etzioni which provides a comprehensive overview of adjustments in management control over both internal processes and external factors which have ensued since the first complaint investigation.

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[57] Katz and Kahn, op. cit., pp. 398 and 366.

Interview data fall roughly into the two types of patterned outcome mentioned above and elaborated below. The responses which have been identified fall extensively into outcomes 1 and 2 on Table 1 and outcomes 1 and 2 on Table 2.

TABLE 1

Conditions Affecting the Activation of Pattern A, Legal Compliance

| Objective Conditions | Mediated by Psychological Variables | Outcome | |
|---|---|---|---|
| 1. Use of appropriate symbols of authority | 1. Recognition and acceptance of symbols | Produces minimally acceptable quantity and quality of work | (1) |
| 2. Clarity of legal norms and requirements | 2. Lack of subjective ambiguity permitting wishful interpretation | Can reduce absenteeism | |
| 3. Use of specific penalties | 3. Individual expectation of being caught | May increase turnover | |
| 4. Expulsion of nonconformers | 4. Desire to stay within system; dependence on system for way of life | Affects innovative and other behavior beyond the call of duty adversely | (2) |

Documentation of a good-faith effort where there is minimal commitment to the principle underlying the requirement, as an example of a response, is consistent with outcomes 1 and 2 on Table 1. The recruiting effort to attract students who will eventually become part of the hiring pool, the creation of special commissions or caucuses within individual schools can be classified as innovative behavior synonomous with outcomes 2 on Table 2.

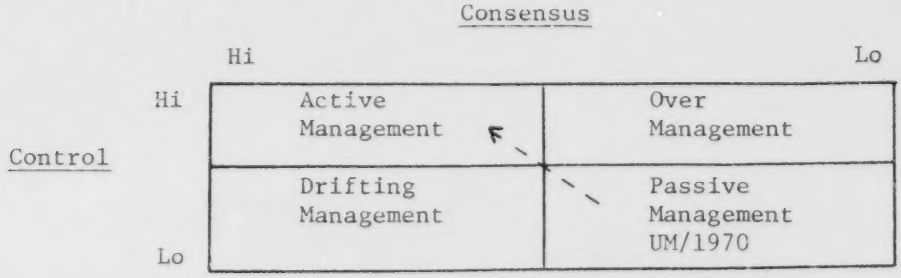
TABLE 2

Conditions Affecting the Internalization of Organizational Goals

| Objective Conditions | Mediated by Psychological Variables | Outcome | |
|---|---|---|---|
| 1. Hazardous character of organizational goals | 1. Individual's own sense of the heroic and dramatic | Reduced turnover | |
| 2. Organizational goals expressive of cultural values | 2. Appropriateness for individual's own values | Increased productivity | (1) |
| 3. Organizational leader as model | 3. Identification with model | Spontaneous and innovative behavior | (2) |
| 4. Sharing in organizational decisions | 4. Perception of being important part of organization | | |
| 5. Sharing in organizational rewards | | | |

Because of the variety of motivations found through the interviews, we might expect the future to produce behavior which both meets the narrowly interpreted letter of the law and responds more creatively to its intent.

In sum, the university's responses to affirmative action have been piecemeal accommodations. However, this is not to say that major changes have not occurred. To illustrate university accommodation and change since 1970, consider Etzioni's Consensus-Control Paradigm.



This model is useful as it explains the external administrative response to the executive order and the internal management response.

The administrative shift from low control and low consensus on this issue toward a higher level of control and consensus is due to many factors. Standardization of information, grievance procedures, hiring and promotion stipulations, and general personnel practices have greatly contributed to more administrative control over processes within the institution related to the executive order. Recognition of the issues, if not commitment to defeat systemic discrimination, has facilitated consensus and promoted the Affirmative Action Program. The mandates of affirmative action and the institutional responses should be appreciated as forces which have potentially increased the effectiveness of university management. While there have been costs, the social objective is being attained with the added benefit of a better-run organization.

# CHAPTER VI

## Some Organizational Implications of Affirmative Action

The preceding case study raises organizational implications for the particular institution studied and also for other institutions involved in compliance with affirmative action mandates. At the organizational level these implications can be divided into two categories. The first consists of those responses which are not consistent with the universities' intent regarding affirmative action. The second consists of behaviors which result from or are demanded by conditions affirmative action imposes.

Some of the following observations are hypothetical and are not necessarily derived from observations of the particular institution under study. Nonetheless, they were stimulated by that case study and are coupled with our general awareness of the problems associated with affirmative action.

### Misconceptions and Misuses

Deans, directors, departmental chairpersons, and others responsible for implementing affirmative action should be periodically interviewed by institutional leaders knowledgeable about affirmative action. Not only does this system clarify misconceptions and prevent misuse, but it also helps to educate individuals who have newly assumed administrative roles. Areas which should be discussed are the legal philosophy of affirmative action, the operational aspects of the law, specific affirmative action responsibilities of the particular employee, and peer-problem solutions.

A possible abuse of affirmative action intent would be its invocation as the excuse for difficult hiring decisions. When the concept of quota is used to justify a decision to the individual not hired or to justify behavior to an irate group, such as those concerned with the protection of white male interests, this is "scapegoatism" and falls outside the intent and letter of the law.

Overspecification of the requisite skills in job descriptions is another problem. Open posting of jobs and their advertisement are meant to expand awareness and the potential pool of applicants. Unncessary overspecification, however, can dampen this effort. It can be used as a subterfuge to narrow the field of applicants to an already identified individual. This, of course, defeats the spirit of the law and, if perceived by HEW as an organizational pattern, could be the basis for investigation.

### Institutional Progress on Goals

Institutional progress, especially in recruitment, hiring, and promotion should be carefully and periodically assessed. This kind of evaluation

is based upon the kind of data analysis suggested by the guidelines.

Delays and Red Tape

A major complaint of administrators attempting to implement affirmative action concerns the delays and red-tape which are a consequence of tremendously expanded advertising, increased recruitment, more applicants and finally search committee and administrative review. The delay in hiring is even more frustrating when a qualified minority member or woman is the prime candidate of more than one institution. Department chairpeople or personnel directors are not free to make the best offer, for all such procedures are now under careful supervision. They must wait for the minimal posting period to expire before an offer can be made. The fear is that a highly sought minority member or woman will take an immediate offer rather than wait.

Better forecasting of faculty demand would help to remedy the situation. If faculty needs were better predicted, advertising could then be scheduled well in advance so that a constant pool of applicants would be on file. Another suggestion would involve the maintenance of a discretionary salary fund to create positions when extraordinary people become available. Direct consultation with the affirmative action officer, Vice President for Academic Affairs, and personnel director could expedite such a decision yet still insure review of objectives and fair practices to all.

Improvement in the quality of information contained in job descriptions would facilitate more speed in the hiring process. If a candidate understood the scope and skills of a job, he/she could better decide whether to submit an application. Hopefully, the use of nondiscriminatory phrases and pledges of equal opportunity will increase the number of qualified minorities and women in the pool. The institution then can consider several such candidates, rather than a single, highly sought-after person. Better use of professional societies' pools and inter-university posting may decrease delay in hiring. Consortium-style personnel offices may be necessary in the future to facilitate affirmative action hiring.

Centralization

The fears and benefits of centralization may be philosophically debated, but most administrators perceive it in terms of who has the power to make decisions. At this point, we feel it crucial to reiterate the distinction between standardization of information and decision making and centralization of the latter. Standardization implies use of a common denominator, whereas centralization implies a change in the location of the decision maker. A university can experience the standardization of information without also

experiencing over-centralization of power. Unfortunately, the two terms are used interchangeably when, in fact, they mean different things. The following will attempt to distinguish the differences and develop the impact of affirmative action on each.

Standardization of information promotes equity within an organization. It facilitates the comparison of similar work, and thus, like reward. However, the relative value of academic work is not clear. Affirmative action demands equal pay for equal work. Yet is a professor, a professor, a professor? One spinoff of salary comparisons caused by newly standardized information points up the fact that law professors earn more than physics professors who make more than English professors. And within each field men usually make more than women. Playing this forward, the university must explain salary discrepancies to the internal community as well as to the external.

One approach which has been used to understand and justify salary differentials is the market model. If a particular profession or discipline is remunerated more in the open market, then to attract and retain quality professors, university pay must at least approach that scale. This logic for professions or disciplines which have an outside market seems reasonable. However, the question of the range of difference in pay within the university between professors readily employable outside academe and those, such as the classicist, with few outside options, remains unanswered. The ultimate question to be resolved is the identification of an appropriate framework for the equalization of pay.

Also, a dangerous extension of the market logic would be to let pay scales reflect market conditions which discriminate against minorities and women in comparison with white males in the same profession simply because the market is the best adjustor of value. In this situation, the law intercedes to alter discriminatory market conditions. The market reflects the norms and values prevalent in the culture. Affirmative action is an attempt to change those norms.

The standardized information demands of affirmative action can bring other benefits as well. Conversion to or expansion of a management information system is a probable consequence of the information needs of affirmative action. Computerization may be appropriate, depending on the other data needs of the institution. Thus, not only progress in relation to goals and timetables will be based on computerized data, but the entire planning of the institution could also become more sound. We suggest that the data collected for affirmative action be recycled to department chairpersons, deans, and directors within the institution, along with instructions for utilization of this information in other policy areas. As an example, envision the exchange of information on likely avenues for graduate placement, on successful hiring sources, or on the creation of positions to be filled by more than one person. The concept of the exchange

of information on solutions to mutual problems of university units is boundless and could include cost effectiveness analysis, teaching techniques, and many others. If seen in this light, affirmative action may be the catalyst for institutional review of its entire informational needs and for implementation of the means to collect, analyze, and report such data. Standardization of information, if handled properly, need not bring centralization but, instead, more professionalism throughout the institution.

However, information is power, and data records now kept could be misused unless a conscious effort is made to protect the privacy of the information. Another consideration is the public accessibility to such data. The collection and storage of information produces free-floating anxiety in our society today. A wise administrator should be thinking of the benefits and potential misuses of information collection. With this analysis at hand, decisions regarding what to collect and how to control dissemination become easier and hopefully better. Centralization of the information and the monitoring of information processes (apart from monitoring the decision makers) suggests that if decentralized decision making is to survive, the institution must pay particular attention to the level and quality of the feedback to its decision makers. The intentional harboring or inadvertent nonreturn of data by executives may indeed lead to centralized decision making, but recycling exists as an alternative to centralization and should be considered.

Responsibilities for changing the academic profile of women and minorities in the institution are often delegated outward to schools and departments, but evaluation of these efforts takes place at progressively higher levels in the system. The potential for discarding this division of responsibility and for decentralizing the monitoring process exists if goals of affirmative action achieve greater acceptance, consensus, and commitment. Faculty now function as the protectors of excellence because excellence is an accepted value. This behavior is monitored at successively higher organizational levels, but review is usually pro forma. Likewise, the potential for faculty monitoring their own affirmative action programs and performance is great when personal commitment to these objectives is high. A social indicator of the acceptance of affirmative action might be when departmental chairpersons regard the setting of goals and timetables and their information-keeping function as valuable management tools in departmental self-assessment, not as Herculean tasks in the service of the federal government.

## Creating and Maintaining Commitment

Despite the formal procedures and management techniques mentioned, affirmative action will not succeed in the absence of an institutional commitment. Further, although a centralized concern must emanate from the president, it must also permeate all levels of university administration.

Obviously, the first step in generating a commitment is an objective assessment of discrimination. This is essential both as an educational exercise for those directly involved and as a method for heightening community receptivity to the normative changes required in a university as part of a larger society. We recommend a period of problem-focused self-study involving faculty, staff, and students, such as a teach-in, as the optimal way of beginning or periodically assessing an affirmative action campaign. With adequate preparation, supervised by a senior line officer at the college or school level, each department would reflect on its own policies and predicaments. An attempt would be made to instill a sense of individual responsibility for the redress of systemic wrongs. The success of affirmative action depends primarily on department chairpersons and members of their executive committees. The lowest level of university leadership, including faculty, must recognize the problem and its causes, perceive the need for affirmative action, and be included in the formulation of affirmative action policy.

Following acknowledgement of the problem, a modicum of concensus on the solutions is necessary. Phony goals and timetables or unrealistic personnel procedures merely frustrate administrators and minorities alike. We recommend that the affirmative action officer work directly with campus units to define particular problems and to arrive at possible solutions that fall within the guidelines.

## The Inclusion of New Individuals and Groups

Although universities have begun opening their doors and jobs to minorities and women, little has been done to anticipate the effects of what is a new systemic input. In general, the feeling has been "Yes, enter, but you fit us, don't expect us to fit you." Contrary to the open-systems approach, this approach assumes that new inputs, will, through some organizational alchemy, result in traditional outputs. The reality, however, is otherwise. Women and minorities counter their foreign environment in three ways: 1) abnormal attrition; 2) passive withdrawal and marginal functioning, with little or no organizational allegiance; 3) confrontation of the establishment. Briefly, let us examine the implication of each of the above coping mechanisms.

Many universities have made honest efforts to attract women and minorities to their professional and nonprofessional enclaves and to their graduate student programs. However, upon arrival few support programs exist for them, and the unfamiliar environment becomes a threatening one. If the prospect of assimilation appears unlikely, the response is to leave. Thus, many black students stay one day or less at some of the most prestigious universities. Black professors hold their job for a year and accept the first chance to move to a more comfortable campus climate. The only women on a male-dominated faculty may choose to exit

rather than endure. Nonretention can be due not to overt hostility but only to cultural shock. Perhaps, if universities viewed the situation as a cross-cultural one, facilitating exchange and understanding between both the new and the old members, retention rates would climb.

Sometimes new arrivals remain but perform in an unsatisfactory manner. Discomfort, hostility, and depression accumulate, affecting the quality of work produced. Withdrawal from all but the most necessary contact is the pattern. The downward spiral is vicious for all concerned because the longer the withdrawal, the harder it is to overcome.

Cross-cultural familiarization can lower anxiety and facilitate communication. Clearly, institutions should be sensitive to the acclimation phase of all new entrants and particularly those who may, for a variety of reasons, perceive themselves as pawns of "tokenism." The institution has an obligation to reinforce its professional legitimacy while also underscoring the diversity of perspective and talents such employees bring. This integration of organizational expectations and individual values is not an easy task and cannot for obvious reasons be delegated to the affirmative action officer in the absence of interpersonal skill at the subunit level. Rather, it must be considered a critical criterion for college and school leadership selection. Only then will the "message" become sufficiently internalized.

The individual's ultimate alternative is conflict. Sometimes conflict is the healthiest response, for it signals self-esteem on the part of the woman or minority person. For others it can be psychically damaging and may signal the premature crystallization of an issue. Assuming personal rather than political motivation, the confrontation usually focuses on value and normative differences. Quite often new groups request provision for their needs through altering existing structures or adding new ones. Women's or black studies, identity and cultural centers, secondary services (a tutoring program or a day-care center), and representation in the establishment's decision making are examples.

The obvious point is that new inputs inevitably produce new outcomes. If a university is changing the racial or sexual composition of its staff and students, planned change in its programs and services must also be included. Without such provision, employee retention becomes problematical and his/her productive potential is often not achieved.

## Economic Cutbacks and Termination

A final point involves the issue of termination. Lately, women and minorities are the last to be hired and possibly the first to be fired. However, this policy can no longer be the case, as the guidelines assert. If an individual has not attained seniority because of race or sex, it is

discriminatory to let that person go solely because of low seniority. Some labor decisions support this position.

Relating this position to financially dictated staff cuts, we urge university administrators to re-examine the criteria for termination. If minorities and women have only recently been employed because of systemic discrimination, they should not necessarily be the first to leave. Criteria considered in addition to seniority might be the value of minorities and women as role models for students, the importance of overcoming systemic discrimination, and the equalitarian objective of affirmative action, which is not contingent on prosperous times alone. While there are some real dilemmas to be faced, these issues deserve careful consideration.

## Managing Processes Involving Employees and Students

Affirmative action came into existence because institutions remained insensitive to the equitable treatment of women and minorities. The law helps to pinpoint specific areas of insensitivity, while the preceding discussion suggests implications which are spin-offs of affirmative action and which require an understanding of how individuals relate to organizational culture and how civil liberties are to be protected in an organizational context. These issues all relate to the quality of working life for the individuals involved and to organizational effectiveness for those responsible for the outcomes of the organization.

A further implication of affirmative action is providing an organizational locus and/or consciousness for responding to the needs of the individual. Affirmative action addresses itself to issues of inclusion, promotion and training, family leave, grievance procedures, and others. An implication of affirmative action considers the cross-cultural needs of individuals after inclusion. It also raises the more general question of equity and quality in organizational life. The implication here is simply that the human needs of the individuals involved in the university should be conceded and that appropriate processes and structures should be evolved to accommodate that acknowledgement.

As yet, there is no "best" way to institutionalize this function. A number of structural alternatives come to mind. The personnel office could augment its frame of reference to include collaboration with student development personnel. Combinations of existing roles such as the affirmative action officer, the ombudsman, or the various special-interest advocates might evolve into a team or position concerned with the individual in the organization. Surely, the processes involved in managing this evolution require asking new questions about the fit between the individual and the university.

The foregoing has posed some of the organizational implications of affirmative action. Implications will naturally vary by organizational

size, location and climate. A minimum response to the law, without analyzing implications for the organization and individual, ignores secondary but crucial aspects of a mandate portending major institutional change.

# CHAPTER VII

## Conclusion

Rather than attempt to summarize this work in a few paragraphs, we thought a check list of specifics would be more comprehensive as well as more helpful to the administrator. Consequently, the following points are suggestions and questions an administrator might note as he/she faces the task of compliance to Executive Order 11375:

- Have you read the HEW Higher Education Guidelines carefully?

- What are your institutional priorities; how does affirmative action relate to them?

- What financial resources exist for support of these institutional affirmative action priorities?

- Have you prepared an operational manual for the deans, directors, and department heads to facilitate their understanding of the affirmative action mandate?

- What role conflicts can be envisioned particularly for those administrators who sit in boundary positions between internal and external organizations? And, what actions can be taken to ameliorate these conflicts?

- Do you want an affirmative action officer who is an advocate or a manager?

- Who should have the ultimate authority for monitoring and implementing affirmative action within the institution?

- Are the division lines clear and powers carefully enunciated for the new internal roles affirmative action creates?

- How can lower-level units be encouraged to create their own compliance methods, relevant to their particular needs, yet uniformly standard in comparison to other units?

- How can contact between the affirmative action officer and lower-level units be guaranteed?

- What grievance procedures exist to manage internal conflict? Will they stand up in court?

- Do termination policies protect women and minorities who have not achieved seniority because of systemic discrimination?

- What media and educational mechanisms are available to create institutional awareness of systemic discrimination and its remedies?

- What local groups exist to facilitate analysis and implementation of affirmative action on your campus?

- How can the entire university be involved in the design of the institutional affirmative action program?

- What institutional supports can be developed to aid women and minorities? e.g. Commission for Women, minorities, etc.

- What plans exist to buffer cultural shock of the new members whom affirmative action attracts and to integrate them permanently into the university community?

- Is the necessary record-keeping system available?

- How will documentary information be collected, used, and stored?

- To what extent can affirmative action be incorporated into general university planning such as conversion of all information to a management information system?

- How can this information be recycled for better, over-all management?

- Are the job tests, hiring standards, and admissions criteria currently in use actually relevant to the task?

- What rational system can be used to establish realistic goals and a timetable?

- How can you actively recruit minority and women to insure a broad applicant pool?

- How can you establish a collaborative relationship with your HEW enforcement office and use its services?

- Use your university attorney, faculty, and student talents to create an informed, aware task force to consider and solve all aspects of systemic discrimination on your campus.

# APPENDIX I

## Interview Questions

These questions formed the basic guide for the interviews. In many instances the questions were adapted to the individual's position. In other interviews, time limited the number of questions asked and the priority in which they were asked.

### Section 1

Specific Questions:

1. How does affirmative action relate to your unit?
2. What plans have you decided to use to implement affirmative action?
3. What organizational units within your school are charged with implementing these plans?
4. How will you assess the success or failure of your affirmative action plan?
5. Are you aware that a director of affirmative action has been appointed? (If so) what relationship do you foresee between your school and this position?
6. How do the needs and conditions in your school differ from those in other schools?
7. Has the necessity of an affirmative action plan necessitated any financial expenditures which you would not otherwise have made or has it necessitated any shifts in the internal budget priorities of your school?
8. What do you think constitutes a good-faith effort?
9. What do you think constitutes an affirmative action goal?

### Section 2

General Questions:

1. What has been your source or sources of information regarding the implementation of affirmative action in the university?

2. What do you understand to be the source of the affirmative action requirement?

3. What are the moral problems which affirmative action poses for the university now--and in the long run?

4. What are the administrative problems which affirmative action poses now--in the long run?

5. What are the merits for your unit and the university of implementing affirmative action?

6. In sum, is the effort for affirmative action as a priority issue worthwhile?

7. Who do you see as the major force behind the affirmative action effort?

   _____ Courts _____ Local Groups _____ HEW _____ Other

8. Do you think affirmative action will be enforced?

   _____ Yes _____ No Why?

   At what level of the University? By whom?

9. In achieving affirmative action, do you see HEW as:

   a. helpful in establishing affirmative action or frustrating affirmative action efforts?
   b. violating university autonomy or respecting university autonomy?
   c. sympathetic to individual institutional problems or unsympathetic to individual institutional problems?

10. Are there any new relationships that you have had to establish within the university community because of affirmative action? Could you describe them?

11. With whom and how have you been involved in formulating these policies and relationships?

12. Do you see affirmative action as a predictor to a new relationship between the courts and higher education?

13. A frequent comment regarding affirmative action is that it violates the institutional autonomy which has traditionally been inviolate? What is your feeling?

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